No. 221

Supreme Court of the United States

OCTOBER TERM, 1949

SHELLY OIL COMPANY, STANOLIND OIL AND GAS COMPANY and MAGNOLIA PETROLEUM COMPANY,
Petitioners,

VERSUS

PHILLIPS PETROLEUM COMPANY,
Respondent.

BRIEF OF RESPONDENT

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November, 1949.

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STATEMENT

Michigan-Wisconsin Pipe Line Company proposed a natural gas pipe line system extending from the Hugoton Gas Field, located in Texas, Oklahoma, and Kansas, to points of connection with distribution systems in the states of Michigan and Wisconsin, or either of them, and at intermediate points (R. 169, 36, 39).[1] To support such a project, the initial cost of which is in excess of $50,000,000.00 (R. 496), it was of course necessary that large reserves of gas be first assured.

The respondent, Phillips Petroleum Company, had gas leases covering approximately 430,000 acres in the field mentioned (R. 14, 15, 49). In the month of December,

[1] The record references are to the printed record in the Court of Appeals, as the printed record in this Court has not been received at the time of this writing.

1945, Phillips was negotiating a contract with Michigan-Wisconsin whereby Phillips was to make available to Michigan-Wisconsin the required gas reserves, not only by dedicating its own acreage but also by dedicating acreage of other companies with which it was to enter into gas purchase contracts. Accordingly, Phillips entered into contracts with four producing companies, consisting of the three petitioners and another producing company,[1] whereby those companies contracted to sell to Phillips gas from leases owned by them separately and covering in all approximately 200,000 acres for the recited purpose of enabling Phillips to make available to Michigan-Wisconsin the required reserves and supplies of gas to justify and support the proposed pipe line system (R. 170, 38, 59). At the same time, the contracts made possible a market to the petitioners, as well as to Phillips, for the gas to be produced from the large acreage involved.

Within a few days after entering into the contracts with the petitioners, Phillips consummated its contract with Michigan-Wisconsin dedicating its acreage and that of the petitioners to the proposed pipe line project (R. 11).

The Natural Gas Act, 15 USCA 717 to 717w, as amended in 1942, 15 USCA 717f(c)-(h), provides that no company which is to transport natural gas in interstate commerce shall construct, acquire or operate any facilities therefor unless there has been issued to it by the Federal Power Commission a certificate of public convenience and necessity. Portions of the Act are attached as Appendix A

[1] This company did not endeavor to terminate its contract and therefore no further reference will be made to it.

That Act provides not only that the Federal Power Commission shall have continuing control of phases of the conduct and operation of interstate gas pipe lines, but also that it shall first determine whether the public necessity and convenience requires that a new interstate pipe line be built, and, if the Commission decides that it does and that a particular applicant is able to perform the service, a certificate of public convenience and necessity is to be issued accordingly. If it is not so determined, the new line cannot be built.

In each of the contracts between Phillips and the petitioners it was set forth that Michigan-Wisconsin desired "to obtain from the Federal Power Commission a certificate of public convenience and necessity *under the requirements of the Natural Gas Act* for a pipe line system"[1] as described above "and in order to obtain said certificate it is necessary that it have made available to it, adequate reserves of natural gas." In fact, the contract with each of the petitioners begins with that recitation (R. 36, 59).

It remained to be seen whether the Commission would determine that the public convenience and necessity required the proposed pipe line project, or some part thereof. There was inserted in the petitioners' contracts a provision to the effect that if a certificate of public convenience and necessity for the construction and operation of the pipe line project had not been issued by December 1, 1946, the petitioners would have the right to terminate by delivery of notice of termination at any time thereafter, "but before the issuance of such certificate." Article II, Section 2 of

[1] Emphasis in this brief are ours unless otherwise indicated.

each of the contracts (R. 41, 59). This was the only condition on which the petitioners could terminate so long as the respondent did not terminate its contract with Michigan-Wisconsin. *Ibid.*

A prolonged hearing upon the application of Michigan-Wisconsin for a certificate of public convenience and necessity was had before the Commission involving many months of evidence and argument as to whether the proposed pipe line project was necessary in the public interest and whether the reserves in the United States and those dedicated to the proposed project were such as to justify this new project (R. 394). As a result, the Commission on Saturday, November 30, 1946, decided the matter in favor of Michigan-Wisconsin (R. 172, 439). On that date it found and determined that the public necessity required the new pipe line project and that Michigan-Wisconsin was able to perform the service (R. 441). On that date it made and adopted in full its order wherein it was ordered that "a certificate of public convenience and necessity be *and it is hereby issued* to Applicant", Michigan-Wisconsin (R. 441). As is the practice of the Commission, and as provided for in the Natural Gas Act, certain conditions were imposed which will be discussed later. (See Point Two, post.) Also discussed later is the matter of the appeal which Panhandle Eastern Pipe Line Company took from the order of November 30, 1946. (See Point Three, post.)

Notwithstanding the action and order of the Commission on November 30, 1946, issuing a certificate, the petitioners saw fit to serve upon the respondent, on the next business day, December 2, 1946, telegraphic notice whereby the petitioners endeavored to terminate their

contracts under the terms of Article II, Section 2 of the contracts upon the claim that a certificate of public convenience and necessity had not been obtained (R. 173, 605-606). By such notices the petitioners sought to withdraw completely the gas reserves which they had dedicated to the pipe line project by their contracts. The respondent refused to recognize such notices as terminating the contracts (R. 8, 9, 109, 126, 136).

Two of the petitioners, Stanolind and Skelly, filed separate suits in a state district court at Austin, Texas, against Phillips wherein they sought to have it adjudged that their respective contracts had been terminated. The petitioner Magnolia did not file suit. It is a Texas corporation (R. 168, 674). A studious attempt was made by the two petitioners in drawing the petitions to avoid stating the true controversy involving the federal question (R. 69-77, 82-88). The respondent endeavored to remove the suits (R. 79, 90) but in the instant case there is no showing that the jurisdiction of the Federal Court in Texas was invoked or that the suits did not remain state court suits, as in fact they did. Motions to remand were sustained prior to the entry of judgment in this case on the ground that the removal was not timely, but with the holding that a federal question supporting federal jurisdiction was presented by the petitions of petitioners even as they drew them. (See our discussion of Point IV and Appendix C.)

In order to properly present the true controversy, and to have that controversy tried out in one suit involving all interested parties in a more appropriate and convenient forum, the respondent instituted this action for declaratory

judgment in the United States Court for the Northern District of Oklahoma.

The respondent alleged in its complaint (R. 2) and the amendment thereto (R. 103) that a certificate of public convenience and necessity had been issued by the Federal Power Commission under the requirements of the Natural Gas Act on November 30, 1946, and hence that the petitioners had no right to terminate. There was attached a full text copy of the order of the Commission which respondent alleged constituted the issuance of a certificate such as was contemplated by, and provided for in, the Act (R. 105, 439).[1] It was alleged that although the Commission adopted the order in full, final and exact text and caused notice to be given on November 30, 1946, the order was not mechanically reproduced by the secretary and full text copies handed out until the next business day, December 2, 1946 (R. 104, 105). Respondent alleged that such was in accord with the procedure of the Commission and under the provisions of the Natural Gas Act, particularly Section 717n(b) and Section 717o, constituted the then "issuance" of a certificate (R. 104). It was alleged that the petitioners contended and asserted otherwise and in so doing they failed to properly construe, or to give appropriate effect to, the Act and the rules, regulations and procedure of the Commission in effect pursuant to the terms of the Act (R. 105). Respondent alleged that the order of November 30, 1946, contained conditions but that they were such as were contemplated and provided for in the Act, particularly Section 717f(e), and the order as

[1] We shall point out and discuss the provisions of the order so alleged in presenting our argument.

so made constituted the then issuance of a certificate under the requirements of the Natural Gas Act (R. 106). Respondent alleged that the petitioners contended and asserted otherwise and refused to recognize the order of the Commission as being within the requirements of the Natural Gas Act and, again, misconstrued and misapplied the Act (R. 9, 106). It was alleged that the actions of petitioners in endeavoring to terminate their contracts as they did on December 2, 1946, necessarily brought into play and called for the construction of the Act and the effect to be given to it (R. 10, 106) and that if the Act be given proper construction and appropriate effect the action of the Commission on November 30, 1946, did constitute the issuance on that date of a certificate of public convenience and necessity under the requirements of the Natural Gas Act (R. 10, 106). Judgment was prayed for decreeing that the Commission did on November 30, 1946, issue a certificate of public convenience and necessity in accord with the requirements of the Natural Gas Act prior to the notices of termination given by the petitioners and, consequently, that such notices were not effective and the contracts were not terminated (R. 10).

The trial court found and concluded that the Federal Power Commission intended to and did in fact issue a certificate of public convenience and necessity to Michigan-Wisconsin on November 30, 1946, and that although the certificate contained terms and conditions, it was one issued on that date "under the requirements of the Natural Gas Act"—"one that is provided for in that act", and consequently that the contracts had not been effectively term-

nated (R. 172-173, 176-177). A declaratory judgment was entered accordingly for the respondent (R. 177). The Court of Appeals affirmed [R. 707-728, 174 Fed. (2d) 89].

SUMMARY OF ARGUMENT

Jurisdiction

1. a. The substantive basis for the jurisdiction of the District Court of this action as to all parties exists because the case is one which "arises under the Constitution or laws of the United States." Only one basic controversy was presented by the suit and that was whether the order of the Federal Power Commission of November 30, 1946, constituted the then issuance of a certificate of public convenience and necessity under the requirements of the Natural Gas Act to Michigan-Wisconsin to construct and operate the pipe line project. The determination of the controversy necessarily depended upon the construction and effect to be given to federal laws. The case falls squarely within the test first enunciated by CHIEF JUSTICE MARSHALL and repeatedly applied by subsequent decisions of this Court: "A case in law or equity consists of the right of the one party, as well as the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either." By that rule continued recognition has been given by this Court to the conclusion that the jurisdictional clause makes the federal judiciary a proper forum not merely to judicially enforce rights conferred by federal laws but also to construe those laws when a question as to their meaning and effect is properly presented for decision in any justiciable controversy.

b. The courts below and the respondent recognize the procedural rule that the federal question must appear upon the face of the complaint as a proper part of the plaintiff's case and not merely by way of anticipation of a defense. As shown by analogous decisions of this Court the rule was not violated here. This is an action under the Declaratory Judgment Act and it was necessary that the complaint disclose an actual justiciable controversy. The plaintiff must set forth his claim and the basis therefor and the defendant's claim and the basis thereof. The plaintiff is not thereby anticipating a defense but instead is showing, as he must, the *controversy* and that the plaintiff is entitled to have the controversy resolved in his favor. It is immaterial whether in some other type of action the federal question would appear as a proper part of the plaintiff's case. This Court has so held in similar cases, such as suits to quiet title wherein it was held that it is a proper part of the plaintiff's case to show the claim of the defendant and its invalidity because of the construction or effect to be given to federal laws, although had the suit been brought in ejectment the federal question would not properly appear. Moreover, the respondent does not dispute the rule that the Declaratory Judgment Act is *procedural* in that it does not create any additional *substantive* basis of federal jurisdiction. It does not follow that the procedural changes wrought by the Act may not permit the pleading of a claim for relief which will be within the jurisdiction of the federal courts, provided as here the substantive basis for jurisdiction exists, although jurisdiction may not be invoked in another type of action because the basis for federal jurisdiction would not be made to properly appear. It has been so held by the decisions on the subject

c. Additionally as to the petitioner, Magnolia Petroleum Company diversity of citizenship existed and jurisdiction was asserted accordingly. For procedural convenience, there were joined here under Rule 20(a) of the Federal Rules of Civil Procedure three separate causes of action against the petitioners who each made a separate contract. The causes remain as separate and distinct as if commenced separately so that if there were no federal question here the judgment against Magnolia should not be disturbed.

The Merits

2. The Federal Power Commission issued a certificate of public convenience and necessity to Michigan-Wisconsin on November 30, 1946, under the requirements of the Natural Gas Act authorizing the construction and operation of the pipe line project. On that date it made the two findings required by the Act—it then completed the action prescribed by Congress—for the issuance of a certificate and in accord with the mandate of the Act then issued a certificate. The Commission's intent to do so is clearly established and expressed. The conditions imposed were to the exercise of rights granted under the single authorization "to construct and operate" the project. Under the language of the order and the express provisions of the Act, the conditions did not preclude the present issuance of a certificate. By them certain requirements were to be met before actual operations began or during operations, but not before commencing construction. Insofar as the authorization of the Commission was concerned Michigan-Wisconsin could have started construction on the night of

November 30, 1946. Condition B viii pertained only to the manner in which a portion of the huge market was to be served. Instead of merely imposing the condition that Michigan-Wisconsin would augment the supply of gas in Detroit and Ann Arbor with due regard to the rights of Panhandle in those two cities, as it could have, the Commission went further and provided in that condition for a more precise specification of those rights by means of a supplemental order. A more definite fixation of those rights was not necessary in order to make the findings required by the Act and to issue a certificate accordingly, and the condition did not purport to hold the grant of a certificate in abeyance. Paragraph C was for the express and limited purpose of extending the time for rehearing. It, also, did not purport to detract from the positive expression of the Commission's intention to grant a certificate on November 30, 1946; it was not intended to, and did not, vitiate or render ineffective all that had been found and ordered on that date.

3. There is no conflict between the decision of the Court of Appeals here and the order of the District of Columbia Court dismissing Panhandle's first appeal as premature. The former did not purport to collaterally attack the latter and did not in effect do so. The two holdings are not "on the same matter." The holding of the District of Columbia Court was that the order was not at the time "final" for the purpose of review. It did not hold that the order was not effective or that a certificate was not issued on November 30, 1946. The fallacy of the petitioners' assertion that there is a conflict lies in their contention that a holding that an order of an administrative body is not final

for the purpose of review is by necessary implication a holding that the order is not effective for any purpose. The contention is plainly repudiated by the decisions of this and other courts as well as by the Natural Gas Act itself.

4. The trial court did not abuse its discretion in declining to dismiss this action as to petitioners Skelly and Stanolind because of two separate suits instituted by them in a state court in Texas. Here the case 1) is "governed by federal law," 2) involved different parties, and 3) was in a more convenient forum. The jurisdiction of the federal court in those suits was not invoked in Texas because the attempted removal was not timely.

ARGUMENT

Point One.

The District Court Had Jurisdiction of This Action.

Jurisdiction of the District Court over the subject matter of this declaratory judgment action insofar as all of the parties are concerned is based upon Section 24 of the Judicial Code, which gives to the United States District Courts jurisdiction of all suits of a civil nature where the matter in controversy exceeds the sum or value of $3,000.00 and "arises under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority" (R. 3, 103-106, 169). Additionally, as to the petitioner Magnolia Petroleum Company jurisdiction is asserted under the same section of the code because of the diversity of citizenship between that petitioner and the respondent (R. 103, 104, 168, 169).

A. The Action Arises Under the Laws of the United States.

As we believe that orderly presentation requires discussion of the *substantive* problem as to whether this case involves a federal question in advance of the discussion of the *procedural* feature as to whether the question is disclosed by proper affirmative allegations of the complaint, we shall discuss the matter of jurisdiction in that order rather than in the order presented by the petitioners.

Only one basic controversy was presented by this suit and that was whether the order of the Federal Power Commission of November 30, 1946, constituted the then issuance of a certificate of public convenience and necessity under the requirements of the Natural Gas Act and the rules and regulations of the Commission to Michigan-Wisconsin Pipe Line Company to construct and operate a pipe line project from a point in Texas to points of distribution in the states of Wisconsin and Michigan, or either of them. If, as the courts below held, the order of November 30, 1946, constituted the issuance of such a certificate on that date, the notices to terminate the contracts were ineffective and the plaintiff was entitled to the judgment which it received. The respondent asserted that the order did; the petitioners disputed that assertion. We understand the petitioners to agree that the "primary issue on the merits" is substantially as we have stated it (see pages 9 and 10 of their brief).

The controversy involved a number of specific questions to be decided: Under Section 7(e), 15 USCA, Sec. 717f(e) and Section 16, 15 USCA, Sec. 717o, and of rules

and regulations of the Commission,[1] is a certificate "issued" when the Commission makes and adopts an order reflecting the decision required by the Act and accordingly then "grants" a certificate or, as petitioners contended strenuously, is it not "issued" until the secretary performs the mechanical function of reproducing the order and hands out full text copies to the parties? Is the Natural Gas Act permissive in nature so as to provide for the issuance of a certificate by action of the Commission in the form of an order finding in favor of an applicant and thereupon issuing a certificate to him, or is it to be likened, as the petitioners have maintained, to the Federal Power Act (16 USCA 799), so that a certificate is not issued until accepted by an applicant? This called for a construction of the entire Act and particularly Section 7(e). Does the Act [Section 7(e)] contemplate and provide for the present issuance of a certificate and the imposition of conditions upon the exercise of the rights granted thereunder so that the order of November 30, 1946, should be held to be the "effective" issuance of a certificate authorizing on that date construction and operation of the pipe line project although the order set forth certain requirements that were to be met in exercising some of the rights thereunder? Does the provision in the Act [Section 7(e); see also Section 7(c)] to the effect that the Commission shall "decide"

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[1]The effect of Rule 50.75 of Provisional Rules of Practice and Regulations under the Natural Gas Act effective July 11, 1938, was disputed by the parties, as was the applicability, and the effect, if applicable, of Rules 13(b) and 2 of General Rules Including Rules of Practice and Procedure effective September 11, 1946, 18 CFR 1.13 and 1.2. The rules and regulations of the Commission have the force and effect of a federal law. **Columbia Broadcasting System v. United States**, 316 U. S. 407, 417-418, 86 L. Ed. 1563, 1570-1571. Cf. **Standard Oil Company v. Johnson**, 316 U. S. 481, 484, 86 L. Ed. 1611, 1615; **Maryland Casualty Co. v. United States**, 251 U. S. 342, 349, 64 L. Ed. 297, 302.

an application for a certificate mean that the Commission must find only two facts before it is empowered to issue a certificate, namely, the ability of the applicant to perform the proposed service and the public necessity for the project, as respondent maintains, rather than to determine all matters presented by the application and pertaining to the project? And is this order to be considered as having made the required determination and as having presently issued a certificate when it contains a finding of the two facts mentioned but provides for the subsequent determination of certain features presented by the application, such as the rates to be charged and a more precise fixation of the amount of gas which shall be supplied in one portion of the area of the operations? In requiring a finding [Section 7(e)] that an applicant is "able and willing" to perform the service proposed, does the Act mean that an applicant must have obtained authorizations from other bodies as required by other laws; that is, is an order of the Federal Power Commission to be deemed to have made the necessary findings and is therefore to be construed as presently issuing a certificate although it shows that an applicant has not obtained approval of his plan of financing from the Securities and Exchange Commission or local authorizations to convert from manufactured gas to natural gas, and in fact requires that such authorizations be obtained? When the Commission makes the necessary findings and then issues a certificate in accord with the Congressional mandate is a certificate to be deemed to be issued and therefore "effective" although at that time the order is not "final" in the sense that it is immediately appealable [Sections 7(c), (e), 16; 19(c), 15 USCA 717f(c), (e), 717o,

717r(c)]? Furthermore, the order of the Commission of November 30, 1946, was made in carrying out the legislative powers properly delegated to it by Congress and has itself the force and effect of law so that a controversy involving the construction and effect to be given to it is of the same jurisdictional status as a controversy involving the construction of a statute enacted by Congress.[1]

At an early date, CHIEF JUSTICE MARSHALL laid down this standard as a test for determining whether or not a case "arises under" the Constitution or laws of the United States:

> "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either." *Cohens* v. *Virginia*, 6 Wheat. 264, 379, 5 L. Ed. 257, 285.

CHIEF JUSTICE MARSHALL subsequently reiterated the test by recognizing that an action arises under the Constitution or a law of the United States when:

> "* * * the title or right set up by the party may be defeated by one construction of the constitution or law of the United States, and sustained by the op-

[1] **Regents of New Mexico College of A & M Arts v. Albuquerque Broadcasting Co.**, 158 Fed. (2d) 900, 905, holding that a decision of the Federal Communications Commission has the same effect as rules laid down by it in the exercise of its authority. For cases recognizing that rules and regulations of a commission have the force and effect of law see ante, note 1 page 14. Also cf. **Penn. General Casualty Co. v. Pennsylvania**, 294 U. S. 189, 194, 79 L. Ed. 850, 855, **Stoll v. Gottlieb**, 305 U. S. 165, 167, 83 L. Ed. 104, 106, recognizing that the matter of the effectiveness and conclusiveness to be given to a judgment of a federal court presents a federal question so as to give federal court jurisdiction. And see **Lancaster v. McCarty**, 267 U. S. 427, 430, 69 L. Ed. 696, 698, dealing with a rate order of the Interstate Commerce Commission.

posite construction. . . . *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, 822, 6 L. Ed. 204, 224.

Since these decisions were announced this Court has repeatedly applied that basic test: *Tennessee* v. *Davis*, 100 U. S. 257, 25 L. Ed. 648 (1880); *New Orleans M & T RR. Co.* v. *Mississippi*, 102 U. S. 135, 25 L. Ed. 96 (1880); *White* v. *Greenhow*, 114 U. S. 307, 29 L. Ed. 199 (1885); *Starin* v. *New York City*, 115 U. S. 248, 29 L. Ed. 388 (1885); *Cooke* v. *Avery*, 147 U. S. 375, 384-5, 37 L. Ed. 209, 212 (1892); *Northern Pacific R. Co.* v. *Soderberg*, 188 U. S. 526, 47 L. Ed. 575, 581 (1905); *Macon Grocery Company* v. *Atlantic Coast Line Railway Company*, 215 U. S. 501, 54 L. Ed. 300 (1910); *Hull* v. *Burr*, 234 U. S. 712, 58 L. Ed. 1557 (1914); *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180, 65 L. Ed. 577 (1921); *Standard Oil Company* v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1611 (1942); *Bell* v. *Hood*, 327 U. S. 678, 90 L. Ed. 939 (1946).

Essentially this same test is used by authors of the texts most frequently relied upon as authorities in this field. In Cyclopedia of Federal Procedure, Second Edition, Sec. 170, it is stated:

> "As a general rule, if it appears from the complaint that plaintiff's right to relief depends upon construction or application of the Constitution or laws of the United States, and the claim is not merely colorable but has a reasonable foundation, this is sufficient to show a federal question involved . . . ."

See also, *Id.* Sec. 322; Hughes Federal Practice, Sec. 535; Dobie on Federal Procedure, Sec. 60, p. 161; 54 C. J., p. 231.

The controversy and its federal nature are shown upon the face of the complaint as amended (R. 3, 103-106, 185). That the claim so presented was not merely colorable, but in fact was the issue necessarily presented, is abundantly shown by petitioners' answers (R. 108 *et seq.*, esp. 110, 114, 130-131), by the trial proceedings (R. 283), by the findings and conclusions of the trial court (R. 169, 176), by the opinion of the Court of Appeals (R. 707-727) as well as by petitioners' contentions in this Court (Petitioners' Br. pp. 9-10, and Points II and III). The fact that after having received adverse decisions on several phases of the controversy concerning the sub-questions which we have enumerated above, the petitioners do not here urge their contentions concerning all of them does not, of course, mean that they were not the subject of substantial controversy below. Even so, the contentions which the petitioners here advance on the merits necessarily demonstrate the federal nature of the controversy.

The petitioners contend that it is not enough that the solution of the sole controversy between the parties will depend upon construction and application of federal laws. They urge that since the decision of the controversy will in turn determine whether the contracts involved are in force, the case must be considered as one involving only state law. Their position has been, in effect, that a case to be one arising under federal laws within the meaning of the jurisdictional clause must be one wherein the particular right sued upon was derived from a federal law and that it is not significant that the right to recover in the case depends upon construction of federal law.

The argument of petitioners was first repudiated by MR. CHIEF JUSTICE MARSHALL in *Cohens v. Virginia, supra*, in this manner (6 Wheat. at 379, 5 L. Ed. at 285):

> "If it be to maintain that a case arising under the constitution or a law must be one in which a party comes into court *to demand something conferred on him by the constitution or a law*, we think the construction too narrow."

Then, further emphasizing the point, Marshall set forth the test immediately following his words last quoted:

> "A case in law or equity consists of the right of the one party, as well as the other, and may truly be said to arise under the constitution or a law of the United States, whenever its correct decision depends on the construction of either."

He explained that the language of the jurisdictional clause encompasses not only enforcement of federal laws by the federal judicial process but also *construction* of them. The clause "enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, *when any question respecting them shall assume such a form that the judicial power is capable of acting on them*." *Osborn v. The Bank of the United States, supra* (9 Wheat. at 818-819, 6 L. Ed. at 223). See also the remarks in *Cohen v. Virginia, supra* (6 Wheat. at 384, 5 L. Ed. at 286).

In the *Osborn* case, CHIEF JUSTICE MARSHALL also took occasion to point out that the fact that "several questions may arise in a cause" which depend on general principles of the law and not upon any federal law does not dis-

qualify a case from being one which arises under the Constitution or laws of the United States, within the meaning of the jurisdictional clause for if it did almost every case involving the construction of a federal law would be withdrawn from the federal judiciary, contrary to the intended scope of the clause under consideration.[1] Thus Marshall also exposed the fallacy, or at least the insignificance, of the statement by petitioners that since there is involved here contracts between the parties the case "arises" under the contracts. Chief Justice Marshall's opinion establishes that if in any justiciable controversy it is properly made to appear that the determination of the controversy, regardless of its nature otherwise, calls for the construction of federal laws the federal judiciary is an appropriate forum to decide the case and its power to do so

[1] In the respect mentioned we here quote for convenience more fully the words of **Marshall. Osborn v. The Bank of the United States**, 9 Wheat. 738, 819-820, 6 L. Ed. 204, 223:

"The suit of the Bank of the **United States v. Osborn et al.** is a case, and the question is, whether it arises under a law of the United States.

"The appellants contend that it does not, because several questions may arise in it, which depend on the general principles of the law, not on any act of Congress.

"If this were sufficient to withdraw a case from the jurisdiction of the federal courts, almost every case, **although involving the construction of a law**, would be withdrawn; and a clause in the constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case, every part of which depends on the constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action; whether his right is barred; whether he has received satisfaction, or has in any manner released his claims, are questions, some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the court, words which seem intended to be as extensive as the constitution, laws, and treaties of the Union, **which seem designed to give the courts of the government the construction of all its acts, so far as they affect the rights of individuals**, would be reduced to almost nothing."

has been provided for by the clause giving jurisdiction of every case arising under the Constitution or laws of the United States. The words of the clause as used in the Constitution and as used in the Act of Congress vesting original jurisdiction in the United States District Courts are substantially identical. In deciding whether a federal question exists so as to give federal court jurisdiction, this Court has applied the same test in determining the scope of the clause as it appears both in the Constitution and in the Act of Congress. See the cases which are cited above as applying the test laid down by Chief Justice Marshall. A discussion of the historical background of the use of the clause in the legislation is set forth in Appendix B of this brief.

Of the many decisions of this Court above cited applying the test laid down by Chief Justice Marshall attention is called to *Smith* v. *Kansas City Title and Trust Company*, 255 U. S. 180, 65 L. Ed. 577, wherein the contention asserted by petitioners here was repudiated. That was a suit by a citizen of Missouri against a Missouri corporation. The right which the plaintiff sought to protect was the right of a stockholder under the State law to prevent the directors from making an investment in bonds which the stockholder contended were issued under an unconstitutional federal statute. MR. JUSTICE HOLMES presented in his *dissent* the exact argument which petitioners make in this case. He cited the prior cases which the petitioners cite and rely upon here. But the majority of the Court held that the case was one arising under the laws of the United States, stating in part (255 U. S. at 199-200; 65 L. Ed. at 585):

"As diversity of citizenship is lacking, the jurisdiction of the district court depends upon whether the cause of action set forth arises under the Constitution or laws of the United States. Judicial Code, § 24.

"The general rule is that, where it appears from the bill or statement of the plaintiff that *the right to relief* depends upon the construction or application of the Constitution or laws of the United States, and that such Federal claim is not merely colorable, and rests upon a reasonable foundation, the district court has jurisdiction under this provision.

"At an early date, considering the grant of constitutional power to confer jurisdiction upon the Federal courts, Chief Justice Marshall said:

"'A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either.' *Cohen* v. *Virginia*, 6 Wheat. 264, 379, 5 L. ed. 257, 285; and again, 'when the right or title set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction.' *Osborn* v. *Bank of United States*, 9 Wheat. 738, 822, 6 L. ed. 204, 224.

. . . . . .

"This characterization of a suit arising under the Constitution or laws of the United States has been followed in many decisions of this and other Federal Courts." (Citing cases).

After further review of the authorities applying this characterization of a suit arising under the Constitution or laws of the United States, the Court said (255 U. S. at 201, 65 L. Ed at 586):

"The jurisdiction of this court is to be determined upon the principles laid down in the cases referred to. In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional and the bonds valid and desirable investments. The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is, therefore, apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue.

"We are therefore, of the opinion that the district court had jurisdiction under the averments of the bill, and that a direct appeal to this Court upon constitutional grounds is authorized."

The petitioners assert as contrary to the opinion in the *Kansas City Title and Trust Company* case, the decision in *Gully* v. *First National Bank*, 299 U. S. 109, 81 L. Ed. 70. But the decision in the *Gully* case was based upon the fact that any possible question of federal law was too contingent and remote, the suit was not one which "really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law" to use the words of the opinion in *Shulthis* v. *McDougal*, 225 U. S. 561, 56 L. Ed. 1205, which was quoted from in the *Gully* opinion, 299 U. S. at 114, 81 L. Ed. at 73.

In the *Gully* case an attempt was made by the petitioner, state collector of taxes, to recover from the respondent bank for state taxes assessed against shares of stock

of the First National Bank of Meridian. The petitioner alleged that the First National Bank was obligated to pay the taxes for the shareholders as their agent out of funds owing to them. The respondent bank had acquired all of the assets of the First National Bank and had contracted with the latter to pay its debts. The petitioner sought to recover on that contract. The respondent endeavored to invoke federal court jurisdiction on removal by alluding to the fact that the First National Bank was a national bank and a federal statute permitted its shares to be taxed. But the opinion makes it plain that there was no real dispute of the fact that the shares were taxable; no actual controversy existed as to either the validity or construction of the federal statute. The opinion states (299 U. S. at 114, 81 L. Ed. at 73):

> "For all that the complaint informs us, the failure to make payment was owing to lack of funds or to a belief that a stranger to the contract had no standing as a suitor or to other objections non-federal in their nature."

Thus, the Court observed:

> "There is no necessary connection between the enforcement of such a contract according to its terms and the *existence of a controversy arising under federal law*."

Further in the opinion (299 U. S. at 117, 81 L. Ed. at 74) the Court pointed out that "The most one can say is that a question of federal law is lurking in the background" and "a dispute so doubtful and conjectural" is not sufficient to divest a state court of jurisdiction.

Hence, the holding in the *Gully* case is not at all contrary to the position of respondent here.

The petitioners seize upon this sentence in the opinion in the case as supportive of their position: "To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element and an essential one of the plaintiff's cause of action." If the construction which petitioners would give to this sentence be valid, the sentence was *dictum*, and *dictum* contrary to previous decisions of this Court. However, we submit that the Court did not have in mind the literal, narrow sense in which petitioners assert the lone statement. This admonition several times given by this Court and as expressed by MR. JUSTICE JACKSON in *Armour & Company* v. *Wantock*, 323 U. S. 126, 132-133, 89 L. Ed. 118, 123, should be borne in mind:

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions, transposed to other facts are often misleading."

Had the Court intended to overrule the holding in the *Kansas City Title & Trust Company* case as well as to repudiate the test laid down by Chief Justice Marshall in *Cohen* v. *Virginia* and the many decisions of this Court enunciating that test, it would seem that the Court would have said so expressly.

Instead of purporting to overrule the former decisions of this Court, there was cited in support of the statement in the *Gully* opinion only these two decisions: *Starin* v. *New York*, 115 U. S. 248, 257, 29 L. Ed. 338, 390, and *First National Bank* v. *Williams*, 252 U. S. 504, 512, 64 L. Ed. 690, 692. The opinions in both of those cases, including the test set forth on the pages to which references were made in the *Gully* opinion, unmistakably support the position of respondent here.

In the *First National Bank* case the Court pointed out that (1) if the statement of the plaintiff's case in the complaint discloses that "it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of an act of Congress" and (2) "If the plaintiff thus asserts a right which will be sustained by one construction of the law, or defeated by another, the case is one arising under that law." The "right" spoken of is further clarified by the summarization of the two requisites mentioned in recognizing that since "the plaintiff's bill discloses a case wherein his *right to recover* turns on the construction and application of the National Banking Law", a case of federal jurisdiction was presented (252 U. S. at 512, 64 L. Ed. at 692). The *Starin* case is to the same effect.

Moreover, reliance was made in the *Starin* case upon *Cohen* v. *Virginia* and *Osborn* v. *Bank of the United States* for the enunciation of the test in determining when a case arises under the Constitution and laws of the United States and it should not, of course, be assumed that Mr. Justice Cardozo did not have in mind the pronouncements in those two cases. We should like to add to our previous

discussion of those two cases this further observation concerning the decision in the *Osborn* case. In pointing out that a case is one within federal court jurisdiction if it calls for the construction of a federal law, although it may involve several questions of fact and local law, CHIEF JUSTICE MARSHALL concluded by saying (9 Wheat. at 823, 6 L. Ed. at 224):

> "We think, then, that when *a question* to which the judicial power of the Union is extended by the constitution, forms an *ingredient of the original cause*, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

It is submitted that it was in that sense that Mr. Justice Cardozo made the statement under observation, bearing in mind the particular problem with which he was dealing as he himself defined it and the authorities cited in support of his statement. That is, the statement was meant to say that when a case is asserted as being within federal jurisdiction on the ground that there is involved the construction or validity to be given to a federal law, there must exist as an ingredient of the cause of action, a real and substantial question as to the meaning and effect of that law; that question must be a necessary part of the controversy presented so that the right of the plaintiff to recover in the case is to turn on the construction of the law as distinguished from a case wherein there is only some remote connection with a federal statute not actually in controversy; not, that the Court intended to say that a case must be one "in which a party comes into court to demand something conferred on him by the constitution or a [federal] law."

Furthermore, the fact that Mr. Justice Cardozo did not intend by the one sentence to which petitioners attract attention to lay down a rule to restrict jurisdiction of the federal judiciary as it had not theretofore been restricted is made apparent by his leaving undefined the principal term of that sentence and the qualification of his opinion which he made in concluding (299 U. S. at 117, 81 L. Ed. at 74-75):

> "This Court has had occasion to point out how futile is the attempt to define a 'cause of action' without reference to the context. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 67, 68, 77 L. Ed. 619, 622, 623, 53 S. Ct. 278. To define broadly and in the abstract 'a case arising under the Constitution or laws of the United States' has hazards of a kindred order."

The best test, of course, as to whether the *Gully* decision may be regarded as overruling the majority opinion in the *Kansas City Title & Trust Company* case, is in the subsequent decisions of this Court. Those decisions clearly show that the Court does not regard the *Gully* decision as overthrowing that case.

In *Standard Oil Company* v. *Johnson*, 316 U. S. 481, 86 L. Ed. 1611, the plaintiff sought to recover taxes imposed under the California Motor Vehicle Fuel License Tax Act on its sales of gasoline to United States Army Post Exchanges. Section 10 of the Act exempted sales to the "Government of the United States or any department thereof." The plaintiff contended that sales to the Post Exchanges were exempt under Section 10, or, if not, that the Act imposed an unconstitutional burden on a federal instrumentality. The California courts held against the plaintiff

on both grounds. On appeal, this Court, by unanimous opinion, held that the state court's construction of Section 10 of the state law was *a federal question*, reviewable in this Court, because it would be determined by construction of the federal rules, regulations and decisions of the United States governing the relationship of the Post Exchanges to the Armed Services. The holding upon this point is shown by the following portion of the opinion (316 U. S. at 482, 86 L. Ed. at 1614-1615):

> "Since § 10 of the California Act made the tax inapplicable to any motor vehicle fuel sold to the government of the United States or any department thereof,' it was necessary for the Supreme Court of California to determine whether the language of this exemption included sales to post exchanges. If the court's construction of § 10 of the Act had been based purely on local law, this construction would have been conclusive, and we should have to determine whether the statute so construed and applied is repugnant to the federal constitution. But in deciding that post exchanges were not 'the government of the United States or any department thereof,' the court did not rely upon the law of California. On the contrary, it relied upon its determination concerning the relationship between post exchanges and the government of the United States, a relationship which is controlled by federal law. For post exchanges operate under regulations of the Secretary of War pursuant to federal authority. These regulations and the practices under them establish the relationship between the post exchange and the United States Government, and together with the relevant statutory and constitutional provisions from which they derive, afford the data upon which the legal status of the post exchange may

be determined. *It was upon a determination of a federal question, therefore*, that the Supreme Court of California rested its conclusion that, by § 10, sales to post exchanges were not exempted from the tax. Since this determination of a federal question was by a state court, we are not bound by it. We proceed to consider whether it is correct."

Admittedly the Court originally had jurisdiction of this case on appeal because of the constitutional question involved, but it could avoid the constitutional question and determine the case on construction of the state law only if such construction were a federal question sufficient to afford a basis for writ of certiorari under Section 237 of the Judicial Code, 28 USCA 344. This Court does not review state questions in a case that is appealed from a state court on a federal ground. *Murdock v. Memphis*, 20 Wall. (U. S.) 590, 22 L. Ed. 429. But a plaintiff in error on appeal on a constitutional ground is at liberty to assign any other ground of error which presents a question involving federal laws. *Prudential Insurance Co. v. Cheek*, 259 U. S. 530, 547; 66 L. Ed. 1044, 1055. In line with the policy which it has established, this Court could have decided the question which it did decide only as it fell within the constitutional prescription of jurisdiction: "all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." Article 3, Section 2 of the Constitution.

Since the decision in the *Standard Oil Company* case is a clear case in which this Court has followed the majority opinion in the *Kansas City Title & Trust Company* case subsequent to the *Gully* decision, it is significant that the brief filed by the United States in that case urged:

"This case does not involve any substantial Federal question which could support a writ of *certiorari* under § 237(b) of the Judicial Code." (See 88 L. Ed. 1614)

and cited in support of that argument *Miller* v. *Swann*, 150 U. S. 132, 37 L. Ed. 1028; *Louisville & N. R. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300, 59 L. Ed. 965; and *Gully* v. *First National Bank*, *supra*. By this decision, this Court has firmly established that the majority rule in the *Kansas City Title & Trust Company* case is still the law after the *Gully* decision.

The effect of the decision in *Standard Oil Company* v. *Johnson* is thus noted by Mr. Justice Frankfurter in the dissenting opinion[1] in *Flournoy* v. *Wiener*, 321 U. S. 253, 271, 88 L. Ed. 709, 719-720:

"Much is to be said for the reasoning of Mr. Justice Holmes in the *Kansas City Title & T. Co.* Case in urging that the incorporation of a federal act into a state law nevertheless makes the suit, for purposes of our jurisdiction, one arising under the state and not under the federal law. But his view was rejected. *In the recent Standard Oil Co. Case we had an opportunity to adopt his view and reject that of the Court in the Kansas City Title & T. Co. Case.* Instead, *we unanimously applied the reasoning of the Kansas City Title & T. Co. Case that where a decision under state law necessarily involves the construction or validity of federal law the determination of such federal law in the application of state law gives rise to a federal question for review here.*"

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[1] The majority did not disagree but decided the case on other grounds.

The comparatively recent decision of this Court in *Bell* v. *Hood* (1946), 327 U. S. 678, 685, 90 L. Ed. 939, 944, indicates that the *Gully* decision is not deemed contrary to the majority opinion in the *Kansas City Title & Trust Company* case, for both of these decisions are cited in support of the following test of federal jurisdiction:

> "Thus the right of the petitioners to recover under their complaint will be sustained if the constitution and laws of the United States are given one construction and will be defeated if they are given another. *For this reason* the district court has jurisdiction."

All decisions of this Court cited by petitioners upon this point (page 30), other than the *Gully* decision, either (1) antedated the decision of the *Kansas City Title & Trust Company* case and are no longer controlling if in conflict with that case or (2) are not in point. Earlier decisions are *Millers Executors* v. *Swann*, 150 U. S. 132, 37 L. Ed. 1028[1]; *L&N RR. Co.* v. *Western Union Telegraph Co.*, 237 U. S. 300, 59 L. Ed. 965[1]; and *Interstate Street Ry. Co.* v. *Massachusetts*, 207 U. S. 79, 52 L. Ed. 111.

The only decisions later than the one in the *Gully* case cited by petitioners are *Puerto Rico* v. *Russell & Company*, 288 U. S. 476, 77 L. Ed. 903, and *National Mutual Ins. Co.* v. *Tidewater Transfer Company*, 337 U. S. 582, 93 L. Ed. Adv. Sh. 1118.

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[1]Mr. Justice Holmes in his dissent in the **Kansas City Title and Trust Company** case relied upon these decisions. Holmes also cited **Shoshone Mining Co. v. Rutter**, 177 U. S. 505, 44 L. Ed. 864, which actually affords an example of where this Court, in a converse situation, has refused to follow petitioners' theory that the federal law in the instant case was incorporated into and made a part of the state law. This Court there held that the reference to state mining laws and local customs in a federal statute did not incorporate them into the federal law so as to make their interpretation a federal question.

The *Puerto Rico* case was in no wise concerned with a situation such as is presented here. The case did not involve a controversy dependent for its outcome on the construction to be given to a federal law. This the Court made clear by pointing out (288 U. S. at 483, 77 L. Ed. at 909):

> "No question of interpretation or enforcement of the federal statute appears upon the face of the complaint."

Rather, jurisdiction was asserted because it was said that a statute authorized the institution of a particular type of action and because the plaintiff, the government of Puerto Rico, had been created by an act of Congress. The holding in the case was that the mere source of the authorization to sue did not present a controversy of a federal nature. The case would be in point here only if the respondent had asserted federal jurisdiction on the sole ground that the action was brought under the Federal Declaratory Judgment Act. It has no applicability to this case.

The opinions in *National Mutual Ins. Co. v. Tidewater Transfer Company, supra*, are not supportive of the position of the petitioners here. The question here presented was not for decision in that case since the sole issue there was the constitutionality of the 1940 act of Congress granting jurisdiction on diversity of citizenship between citizens of the District of Columbia and citizens of the several states. Inasmuch as six of the justices participating in that case concurred in the unanimous opinion in the *Standard Oil Company of California* case (Justices Black, Reed, Frankfurter, Douglas, Murphy and Jackson) which applied the rule of the *Kansas City Title and Trust* case in a case where

the question was squarely presented (See Mr. Justice Frankfurter's comments in that regard, *supra* p 31), it is not to be supposed that any of the remarks made in the opinions in the *National Mutual Insurance Co.* case by the same justices, where the question was not for decision, were intended to indicate a reversal of their views. However, as reference has been made by the petitioners to some of the language in two of the opinions in that case we desire to make several observations concerning each of the opinions.

By way of illustration of the view as to powers granted under Article 1, rather than Article 3 of the Constitution, Mr. Justice Jackson commented on the import of bankruptcy-case opinions by the statement that a contrary view to the one expressed "would be difficult *if* we still adhere to the doctrine of Mr. Justice Holmes that 'a suit arises under the law that creates the cause of action.' *American Well Works Co.* v. *Layne & B. Co.*, 241 U. S. 257, 260, 60 L. Ed. 987, 989, 36 Sup. Ct. 585, for the cause of action in each case rested *solely on state law.*" (337 U. S. at 596, 93 L. Ed. at 1128). Here again we submit that those expressions are to be considered in light of the particular problem being discussed. The *American Well Works* case was one for malicious libel. The contention was made that the suit was within Federal Court jurisdiction because the libelous statements were made under alleged patent rights. But this Court pointed out:

> "It is no part of it [the plaintiff's case] to prove anything concerning the defendants' patent, or that the plaintiff did not infringe the same—still less to prove anything concerning any patent of its own" (241 U. S. at 259, 60 L. Ed. at 989).

That case did not present either 1) a controversy involving the enforcement of a right conferred by federal law or 2) a controversy which although not involving a right conferred by federal law was nevertheless dependent for its outcome upon the construction or effect to be given to a federal law. Hence Mr. Justice Holmes' remark was dictum if thereby it was intended to say that a suit arises *solely* under the law that creates the cause of action, and if by the word "creates" it was intended to *exclude* the law upon the construction of which the outcome of the suit depends—questions not necessary to a decision in that case, because under any view the action did not arise under the laws of the United States. It will be remembered that Mr. Justice Holmes did have occasion later to express his views in favor of limiting federal court jurisdiction to suits which are created by federal law in the *literal* sense, (*i.e.* excluding the law upon the construction of which the outcome depends) and that they were rejected by a majority of the Court. *Smith* v. *Kansas City Title & Trust Co.*, *supra*.

As to the significance of the language in the *Gully* case we submit our previous discussion of it.

Also in the opinion of MR. JUSTICE JACKSON reference was made to the statement in *Puerto Rico* v. *Russell*, *supra*, to the effect that "the federal nature of the right to be established is decisive—not the source of the authority to establish it." We do not take this to mean, however, that if the establishment of the right of the plaintiff to recover in a given case will depend upon the construction and effect to be given to a federal law the right is not of a federal nature. Rather, the statement serves to emphasize the point being made by reference to the cases cited,

namely, that the mere fact that a federal law serves as a source of authority to establish a right does not itself present a case arising under the law of the United States. This, of course, is far from saying that if the right to recover in a given case is dependent upon the construction to be given to a federal law, no federal question exists and no federal jurisdiction may be involved. And it is submitted that this is made apparent by these further words in the opinion (337 U. S. at 598, 93 L. Ed. at 1129):

> "Both controversies, like the one before us, called for a determination of *no law question* except those arising under state laws."

In his opinion, MR. JUSTICE RUTLEDGE did not seem to set forth a limitation upon federal court jurisdiction such as the petitioners contend. On the contrary, he cautioned against taking literally isolated sentences in the cases mentioned by Mr. Justice Jackson. He did so by referring to the statement concerning a cause of action arising under the laws that created it merely as a "suggestion" and then pointed out (337 U. S. at 613, 93 L. Ed. at 1137) that this Court has observed that a " 'cause of action' may mean one thing for one purpose and something far different for another. *United States* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, 67, 68, 77 L. Ed. 619, 622, 623, 53 Sup. Ct. 278." He followed that citation by page reference to that portion of the opinion in the *Gully* case wherein "cause of action" was commented upon as we have called attention to above.

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[8] Insofar as the reference in the opinion to a law review article concerning the substantial identity of the constitutional and legislative clauses is concerned we refer to our discussion of that feature attached as Appendix B.

We do not understand that MR. JUSTICE FRANKFURTER intended in his opinion to express any view contrary to the rule which he recognized in his opinion in *Flournoy* v. *Wiener*, *supra*, as being established by the decisions of this Court. In his opinion he pointed out (337 U. S. at 650, 93 L. Ed. at 1146):

> "Insofar as the courts established under Article 3 can entertain a case not *involving* the Constitution, the laws of the United States or treaties, nor concerning admiralty, they do so because of the status of the parties enumerated with particularity in Article 3."

This, we take it, not only is not contrary to, but impliedly recognizes, the pronouncement that if a case does involve a law of the United States, as where the right of the plaintiff to recovery in his case may be sustained under one construction of a federal law but defeated under another, the case is one arising under federal law so as to give federal court jurisdiction.

Neither do we find anything in the opinion written by MR. CHIEF JUSTICE VINSON indicative of a view other than that which the respondent asserts here as having been established by the previous decisions of this Court. Attention is called to this expression in the Chief Justice's opinion (337 U. S. at 650, 93 L. Ed. at 1157):

> "We can no more review a legislative court's decision of a case which is not among those enumerated in Art. 3 than we can hear a case from a state court involving *purely state law questions*. But a *question under* the Constitution and laws of the United States, whether arising in a constitutional court, a state court, or a legislative court may, under the Constitution, be a subject of this Court's appellate jurisdiction."

Thus, to conclude this feature, the respondent submits that the rule has continued to stand to the effect that "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either." By that rule long since established by this Court continued recognition has been given to the conclusion that the federal judiciary is an appropriate forum not only to judicially enforce rights conferred by federal laws but also to construe those laws when a question as to their meaning or effect is properly presented for decision in any justiciable controversy.

B. The Federal Question Is Disclosed by Proper Affirmative Allegations of the Complaint.

The respondent does not dispute the rule that the federal question, the basis for federal jurisdiction, must appear on the face of the plaintiff's complaint, unaided by anticipation of a possible defense. Neither the Court of Appeals nor the District Court failed to give recognition to the rule referred to by petitioners but, following decisions of this Court, held the rule inapplicable here (R. 720).

As above shown, the dispute between the parties was whether a certificate of public convenience and necessity authorizing the construction of a proposed pipe line was issued by the Federal Power Commission "under the requirements of the Natural Gas Act" to Michigan-Wisconsin Pipe Line Company prior to the delivery to respondent of

certain termination notices and, in turn, whether the contracts between the parties had been terminated. If action taken by the Commission is determined to constitute the issuance of such a certificate, then the termination notices were ineffective and the contracts between the parties remain in full force and effect. To conclude the controversy, this declaratory judgment action was brought.

As a matter of proper pleading, the federal question in this case would affirmatively appear in any action which the respondent might have brought to protect its rights. Allegations regarding the provisions of the contracts and the serving of the termination notices would be required to state any cause of action. When these facts are pleaded, obviously no relief can be claimed without further pleading that the termination notices were not effective because, if the Natural Gas Act be properly construed and applied to the facts relative to the action of the Federal Power Commission, there was a certificate under the requirements of that Act issued prior to delivery of such notices. Such pleading would raise the federal question without anticipating a defense. Since the sole controversy between the parties results from their divergent views as to whether the Commission's action on November 30, 1946, constituted the issuance of the required certificate, it would be impossible to properly plead any cause of action designed to resolve that controversy without revealing the federal question. Petitioners Skelly and Standard attempted to do so in the Texas cases filed by them without success.

Proper Affirmative Allegations Vary With the Type of Action.

Moreover, it is deemed immaterial whether or not in some other type of action it would be necessary to show the federal question in pleading the plaintiff's claim for relief. The determinative factor is whether it is proper to show the federal question in affirmatively stating plaintiff's claim for relief in the type of action actually brought. Under the Declaratory Judgment Act the complaint must disclose an actual, justiciable controversy. It is an essential part of the plaintiff's cause of action to show the facts relative to the controversy which in the instant case clearly discloses the federal question. The plaintiff must set forth his claim and the basis therefor and the defendant's claim and the basis thereof. The plaintiff is not thereby anticipating a defense but instead is showing, as he must, the *controversy* and that the plaintiff is entitled to have the controversy adjudicated in his favor. *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 240; *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U. S. 270, 272; *Nashville, C. & St. P. Ry. Co.* v. *Wallace*, 288 U. S. 249, 260; *United Public Works of America* v. *Mitchell*, 330 U. S. 75, 89.

This Court has held that if in the type of action which a plaintiff brings it is proper for him to show that a determination of the action involves the construction and application of a federal law, federal jurisdiction exists although had the plaintiff brought another type of action based upon the same facts the allegations would be in anticipation of a defense and not supportive of federal jurisdiction. *Lancaster* v. *Kathleen Oil Co.*, 241 U. S. 551; *Hopkins* v. *Walker*, 244 U. S. 486. The analogy of those decisions to the case here is singular.

In the *Lancaster* case the bill alleged that Lizzie Brown received from the United States a patent to the lands in question as her homestead allotment as a member of the Creek Tribe of Indians; that she died leaving surviving her heirs; that the heirs executed an oil and gas lease to plaintiffs and thereafter executed a lease to Kathleen Oil Company, which lease was approved by the Secretary of the Interior; that Kathleen Oil Company had entered into possession and was operating under its lease and was producing and selling oil and gas. The bill alleged that plaintiff's lease, although not approved by the Secretary, was valid, and that the subsequent lease to the Kathleen Oil Company which was approved by the Secretary of the Interior was void because by the Act of Congress of May 27, 1908, the land of Lizzie Brown descended to her heirs free from any restriction against leasing the same for oil and gas and because, if that Act did impose restrictions as to such a lease, it was void for repugnancy to the Constitution of the United States. The prayer was for an injunction against the defendant, Kathleen Oil Company, from entering on the land and continuing to operate its lease; that all defendants be restrained from interfering with plaintiffs in conducting operations under their lease and from asserting or claiming any right to the oil and gas under the land and for an accounting for the oil and gas which had been removed.

The complaint was dismissed by the District Court on the ground that it failed to state a "case arising under the Constitution or a law or treaty of the United States."

This Court in reversing the District Court said (241 U. S. at 554, 60 L. Ed. at 1165):

"As it is apparent that the court below erred if the allegations concerning the validity of the lease of the plaintiffs, and the invalidity of that of the defendant company, were material to the cause of action stated in the bill, we come at once to that question. In support of the proposition that such allegations were not material, it is argued that the suit was the equivalent of an action at law in ejectment to recover possession of the leased premises, but was brought in equity because under the law of Oklahoma a lessee of an oil and gas mining lease under circumstances here disclosed had no right to sue in ejectment. *Kolachny* v. *Galbreath*, 26 Okla. 772, 38 L. R. A. (N. S.) 451, 110 Pac. 902. *Further, it is said that as, in a suit in ejectment it is only necessary to allege a right of possession by the plaintiff and a wrongful possession by the defendant, averments by anticipation of assumed defects in the plaintiffs' title, to be alleged by the defendant, and of the causes which would be relied upon to establish want of title in the defendant, are not relevant or essential, and are to be disregarded in determining the question of the jurisdiction of the court as a Federal court.* This, it is said was expressly decided in *Taylor* v. *Anderson*, 234 U. S. 74, 58 L. Ed. 1218, 34 Sup. Ct. Rep. 724, and that case is relied upon as conclusive of this controversy.

"*But without questioning in the slightest degree the doctrine expounded or the conclusion reached in the Taylor Case, we think it can here have no application, since we are of the opinion that the assumption that the cause of action alleged in the bill under consideration is the equivalent of a suit in ejectment is wholly without foundation.* We say this because the prayer of the bill makes it clear that the object of the suit was not only the recovery of possession, but also an injunction forever restraining the defendant company from asserting any rights under its lease, and

from interfering with the rights of the plaintiffs under their lease. Such relief, it is apparent, could be granted only after determining the rights of the parties under their respective leases, which would require a construction of the act of Congress referred to as well as a decision concerning the authority of the Secretary of the Interior in approving the defendant company's lease, and the effect to be given to such approval."

Although this case was cited by the Court of Appeals in support of its holding here (R. 720), we find no mention of it in petitioners' brief.

Hopkins v. *Walker, supra,* was a suit to quiet title to a placer mining claim. There was no dispute as to whether there was a federal question requiring the construction of the mining laws, but the defendants urged that this federal question appeared only because of the allegations which formed no part of plaintiffs' cause of action but were merely in anticipation of defenses and asserted the rule which petitioners would apply to the instant case. This Court's decision upon this point is reflected by the following portion of the opinion by MR. JUSTICE VAN DEVANTER (244 U. S. at 490, 491, 61 L. Ed. at 1274, 1275):

"In both form and substance the bill is one to remove a particular cloud from the plaintiffs' title,—as much so as if the purpose were to have a tax deed, a lease, or a mortgage adjudged invalid and canceled. It hardly requires statement that in such cases the *facts showing the plaintiff's title and the existence and invalidity of the instrument or record sought to be eliminated as a cloud upon the title are essential parts of the plaintiff's cause of action. Full recognition of this is found in the decisions of this and other courts.* (Citing authorities.)

"Thus, whether we apply the general rule or the Montana rule, it is manifest that the allegations of the bill which it is insisted must be disregarded are material parts of the plaintiffs' cause of action; that is to say, they are important elements of the asserted right to have the recording of the certificates canceled as a cloud upon the title.

* * * * * * *

"We are accordingly of opinion that the bill states a case arising under the mining laws of the United States, and of which the District Court is given jurisdiction."

Petitioners attempt to avoid this Court's holding in the *Hopkins* case by saying (page 23 of their brief) that the *Hopkins* case involved the removal of a particular cloud from the plaintiff's title and the nature of the defendant's claim and its invalidity constitute essential parts of the plaintiff's cause of action and the removal of the cloud is the entire purpose of the suit. This affords no basis for distinguishing the case but demonstrates its applicability to the present problem. As above stated, the allegations of the plaintiff's complaint in a declaratory judgment action must likewise set forth the claim of the defendants in order to show the existence of the type of controversy which is a proper subject of declaratory relief, otherwise the Court will deny such relief. Such allegations definitely constitute a part of the plaintiff's cause of action.

The petitioners cite *Barnett* v. *Kunkel*, 264 U. S. 16, 20, 68 L. Ed. 539, 541, as distinguishing the holding in the *Hopkins* case. The manner in which the *Hopkins* case was there distinguished adds further support to the position of respondent here.

The present action is closely comparable to a suit to remove a cloud from one's title. In *Davis* v. *American Foundry Equipment Co.* (7 Cir.), 94 Fed. (2d) 441, 115 A. L. R. 1486, plaintiff sought by a declaratory judgment action to establish the validity of a certain patent license agreement which defendant claimed to be void by reason of plaintiff's failure to comply with a certain state statute. The Court characterized the action as one in the nature of a suit to remove a cloud from title, saying:

> "True it is that plaintiff might not invoke the court's jurisdiction in a suit to recover $2,000 in money, but this suit is for other relief; it is in the nature of a suit to quiet title, by which equity jurisdiction is invoked in order to secure a decree of nonexistence of apparent clouds upon one's title. So, here, plaintiff seeks to have the court remove any doubt as to the validity of the contract. In such a situation to exercise jurisdiction under the Declaratory Act is not to extend the jurisdiction of the court but merely to hasten the day when that jurisdiction may be invoked, and as in suits quieting titles, the amount in controversy is the value of the thing which it is said is incumbered with a voidable cloud."

Similarly, respondent in this action seeks to establish the validity of its contracts and to free them from the "cloud" which results from the attempted termination notices served by petitioners. It hardly requires stating that in such a case the facts showing the validity of the contract and the existence and ineffectiveness of the termination notices are essential parts of the plaintiff's cause of action.

Ter Haar v. *Kettleman North Dome Association* (D. C., Calif.), 34 Fed. Supp. 823, was an action to recover damages for trespass. JUDGE YANKWICH pointed out that:

> "Had the plaintiff cast his claim in the form of a general allegation of ownership and a charge of trespass, his complaint would not have disclosed a controversy within the jurisdiction of the district court."

But the plaintiff pleaded a title by patent from the United States with a reservation of the minerals to the United States. Having set forth the reservation, plaintiff was compelled to show that although the defendants were operating under a lease from the United States, they were not paying the damages which he was authorized under the federal statute to receive. Although Judge Yankwich recognized the general rule that unnecessary allegations in a plaintiff's complaint anticipatory of defenses cannot be considered in determining whether the question is one within the jurisdiction of the District Court, he held that the plaintiff, by particularizing the source of the defendant's claim of right to enter upon the premises and the basis upon which the plaintiff asserted a wrongful invasion of his rights of ownership under the patent, affirmatively showed that the determination of the controversy depended upon the meaning and effect of the laws of the United States; therefore, that the case was clearly one arising under the laws of the United States. The *Ter Haar* case is closely analogous to the present case, for in pleading the contracts between the parties, petitioners' right of termination in certain events was disclosed. In order to present the existence of a controversy, it was necessary for respondent to plead the facts with regard to the attempted termination of the contracts, and having so pleaded, it was then essential, in order to show a right to relief, to plead facts necessary to show the issuance of a certificate under the Natural Gas Act prior to receipt

of the termination notices. These are all proper affirmative allegations necessary to state respondent's claim for relief. None of them is in anticipation of a defense and they clearly disclose the federal question.

In *Cox* v. *Gilmer* (C. C. Va.), 88 Fed. 343, the Court held that in an action for false imprisonment, averments in the complaint that the defendants, acting as judges of an election, caused plaintiff's arrest and imprisonment under color of a state law which is repugnant to the Constitution of the United States, was not open to the objection of anticipating the defense for the purpose of showing that a federal question is involved. For additional analogous cases, see also, *Seber* v. *Spring Oil Co.* (D. C. Okla.), 33 Fed. Supp. 805; *Jackson* v. *Gates Oil Co.* (8 Cir.), 297 Fed. 549; *Allen* v. *New York P. & N. R. Co.* (8 Cir.), 15 Fed. (2d) 532; cert. den. 273 U. S. 756, 71 L. Ed. 876.

The Rule That the Declaratory Judgment Act Does Not Enlarge Federal Court Jurisidiction Is Limited to Substantive Jurisdiction As Distinguished From the Procedural Requirement That Jurisdiction Appear From the Face of the Complaint.

Declaratory Judgment Action May Sometimes Be Brought in Federal Court Where That Court Would Not Have Jurisdiction of Another Type of Action.

Where jurisdiction is asserted on the ground of the existence of a federal question, the Court is required to consider the essential nature of the controversy in determining whether or not the suit arises under the laws of the United States so as to vest jurisdiction in the federal court, and where it appears that, in the determination of that controversy, it will probably be necessary to construe and

apply a federal statute or rules and regulations issued by a federal agency, a federal question exists. To this extent federal jurisdiction depends upon a matter of substantive law. It is not sufficient, however, that the essential nature of the controversy presents a federal question. It is also necessary that the federal question be disclosed by the plaintiff's complaint, unaided by anything alleged in anticipation of avoidance of a probable defense. To this extent, determination of federal jurisdiction is a matter of pleading and is therefore procedural.[1]

The authorities cited by petitioners are to the effect that the Federal Declaratory Judgment Act is procedural in that it does not create any additional substantive basis of federal jurisdiction. Respondent does not dispute this rule. But this does not mean that the procedural changes wrought by the Declaratory Judgment Act may not permit the pleading of a claim for declaratory relief which will be within the jurisdiction of the federal courts in some instances where previously the plaintiff would have been confined to the state courts. Federal jurisdiction may result not from any change in jurisdictional requirements but by virtue of the application of the well settled jurisdictional tests to a different type of claim for relief. The petitioners dispute this conclusion, insisting that to take jurisdiction in

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[1]The Judiciary Act, except for limitation of amount in controversy, is as broad as the Constitution in conferring jurisdiction upon the United States district courts. Sec. 41, Title 28, USCA (Judicial Code, Sec. 24, Amended); Sec. 2 of Art. III of the Constitution. It is only by judicial interpretation, based upon the limited nature of federal court jurisdiction, that the rule has been evolved that the facts necessary to confer federal court jurisdiction must appear upon the face of the complaint. **New Orleans M. & T. R. Co. v. Miss.**, 102 U. S. 135, 26 L. Ed. 96; **Metcalf v. Watertown**, 128 U. S. 586, 589, 32 L. Ed. 543, 544; **State of Tennessee v. The Bank of Commerce**, 152 U. S. 454, 38 L. Ed. 511. See also the discussion set forth in Appendix B of this brief.

the present instance would do violence to the principles established by those authorities cited in their brief. Petitioners argue that the plaintiff does not have the right to determine federal jurisdiction by choice of remedies; that if allegations essential to state a cause of action for coercive relief would not disclose the federal question, the plaintiff will be excluded from the federal courts even though pleading of facts sufficient to show the federal question is essential in order to state the cause of action for a declaratory judgment. This is a specious argument.

None of the cases cited by petitioners supports their position. None of those cases actually deals with the problem of whether the plaintiff can show federal jurisdiction by reason of affirmative allegations in a declaratory judgment action which would be an anticipation of a defense in any other action arising from the same controversy. On the other hand, there are decisions which directly hold that a different result as to federal jurisdiction may be reached by proceeding under the Declaratory Judgment Act in lieu of seeking damages or other relief. One such decision is *Davis v. American Foundry Equipment Co. supra*, 94 Fed. (2d) 441 (see ante, p. 45). The sole question before the Court of Appeals in that case was as to the jurisdiction of the Federal District Court in a declaratory judgment action brought to establish the validity of a contract. Only $2,000 had accrued under the contract which the defendant claimed to be invalid, but future payments which defendant would be required to make if validity of the contract were established would be $7,500. The defendant insisted that since in a normal action for damages or specific performance the amount in controversy would be less than the jurisdictional

amount, granting of relief would do violence to the general rule that the Declaratory Judgment Act does not change the jurisdictional requirements for suits in federal courts. In other words, the defendant in that case took the same position as petitioners argue here, that since plaintiff could not have gotten into federal court with a conventional action to enforce its contract, a federal court would have no jurisdiction of the declaratory judgment suit. The Court of Appeals sustained the jurisdiction of the federal court. See the annotation to that case, appearing at 115 A. L. R. 1489, for the decisions recognizing the rule established in the *Davis* case. If it were assumed, contrary to our belief, that respondent was able to disclose the existence of a federal question in this case in affirmatively stating its cause of action only because of the prerequisites for pleading a declaratory judgment action, then *Davis* v. *American Foundry Equipment Co.*, is clear authority for the proposition that the federal court would nevertheless have jurisdiction. For additional examples see *Guardian Life Ins. Co. of America* v. *Kortz* (10 Cir.), 151 Fed. (2d) 582; *C. E. Carnes & Co., Inc.* v. *Employers' Liability Assur. Corp.* (5 Cir.), 101 Fed. (2d) 739; and *Homes Insurance Co.* v. *Trotter* (8 Cir.), 130 Fed. (2d) 800.

Prior to the passage of the Federal Declaratory Judgment Act, in a situation where the holder of a patent interfered with the business of an alleged infringer by threatening suits for infringement, the alleged infringer could not sue the patentee in the Federal Court for a declaration that the plaintiff was not infringing or that the patent was invalid. But under the declaratory judgment law, the alleged infringer, once he is threatened by a patentee, has a

remedy enforceable in Federal Court by complaint for a declaratory judgment. Now the controversy between the parties as to whether an infringement exists can be so presented to the Court as to affirmatively disclose that it involves the construction and application of the patent laws and arises under those laws so as to give the federal court jurisdiction. See *Aralac, Inc.* v. *Hat Corp. of America* (3 Cir.), 166 Fed. (2d) 286, and cases cited in footnote No. 9, 166 Fed. (2d) at 292.

In *Mississippi Power & Light Co.* v. *City of Jackson* (5 Cir.), 116 Fed. (2d) 924, cert. den. 312 U. S. 698, 85 L. Ed. 1133, the plaintiff sought a declaratory judgment to have it determined that under a contract to supply gas to the city it was not required to furnish gas from the Jackson Field, which was insufficient to supply the city, hence that rates in its contract with the city covering gas from that field would not apply. The lower court entered an order dismissing the case for want of jurisdiction because of the prohibition of the Johnson Act, 28 USCA 41 (1). The Circuit Court remanded the case, however, holding that the Johnson Act did not prevent the bringing of such a declaratory judgment suit. The Johnson Act was designed to exclude from the jurisdiction of federal courts suits to restrain or suspend the enforcement of orders affecting the rates of public utilities. The Court held that it did not extend to a case of this kind where neither injunctive nor other suspensive orders were sued for. It is manifest that in that case the use of the declaratory judgment procedure afforded the plaintiff a remedy in the Federal Court, whereas, if it had sought a direct remedy by injunctive or suspensive orders, the Federal Court would not have had jurisdiction.

The foregoing clearly shows that federal courts often have jurisdiction over claims for declaratory relief even though no other type of action based upon the same facts would meet the requirements for establishing federal jurisdiction. The requirements have not been changed. The Declaratory Judgment Act does not afford any new substantive basis of jurisdiction but, when the old pre-existing tests of federal jurisdiction are applied to the new type of action, a different result may be obtained. In such cases the jurisdiction of the federal courts has been uniformly upheld.

Given Proper Substantive Facts, the Pleader Is Master to Determine Whether He Will State a Claim Within the Jurisdiction of the Federal Courts.

A different jurisdictional result may be and often is obtained because of the plaintiff's choice of the type of action or even the language employed in pleading his claim for relief. Thus in *Taylor* v. *Anderson*, 234 U. S. 74, 58 L. Ed. 1218, cited in petitioner's brief at page 22, Justice Van Devanter's opinion indicates that had the action there been a bill in equity to cancel the deed instead of an action in ejectment, the allegations disclosing a federal question would have been a proper part of plaintiff's affirmative allegations, whereas they were not an appropriate part of a petition in ejectment, hence could not be considered in determining federal jurisdiction. It is the very nature of the rule barring the showing of a federal question by anticipating a defense that a measure of control over the jurisdiction of the court will rest in the hands of the plaintiff who pleads his cause of action. *State* v. *Coosaw Mining*

Co. (C. C. So. Car.), 45 Fed. 804, 810 (aff. 144 U. S. 550, 36 L. Ed. 537); *Winters* v. *Drake* (C. C. Ohio), 102 Fed. 545. This Court has held:

> "A party who brings a suit is master to decide what law he will rely upon, and therefore does determine whether he will bring a 'suit arising under' the patent or other law of the United States by his declaration or bill." *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25, 57 L. Ed. 716, 717; *Bell* v. *Hood*, 327 U. S. 678, 681, 90 L. Ed. 939, 942. See also *Barnett* v. *Kunkel*, 264 U. S. 16, 20, 68 L. Ed. 539, 541.

The mere fact that the essential allegations for stating a cause of action would not disclose a federal question does not preclude an amplification of those facts in order to disclose a federal question. *Ter Haar* v. *Kettleman North Dome Association, supra; Jewell* v. *Cleveland Wrecking Co. of Cincinnati* (8 Cir.), 111 Fed. (2d) 305. In the *Jewell* case, plaintiff sought to recover damages in excess of $3,000.00 for personal injuries alleged to have been caused by a fall from a stepladder while plaintiff, an employee of the defendant, was assisting in the raising of a "building at Ninth Street and Grand Avenue in Kansas City, Missouri." The lower court assumed jurisdiction of the cause of action because of the showing on petition for removal that the building described was actually the Federal Building in Kansas City, but on appeal the Court of Appeals stated that the allegations of the complaint were all that could be considered in determining the jurisdiction of the District Court and since the amended complaint failed to show that the building in question was the Federal Building, the case was not within the jurisdiction of the federal court. Obviously the plaintiff could properly have

pleaded affirmatively that the building was a federal building and could thereby have presented a federal question. It is clear from the foregoing that there is no inhibition against altering the results as to jurisdiction by the declaratory judgment procedure merely because control over jurisdiction in a given controversy is thereby given to the pleader.

The federal question involved in this case is stated affirmatively as an essential part of the respondent's claim for relief, not in avoidance of a possible defense. The complaint therefore discloses an adequate basis for jurisdiction of the Federal Court.

C. Jurisdiction As to the Petitioner Magnolia Petroleum Company Also Exists Because of Diversity of Citizenship.

The respondent, Phillips Petroleum Company, is a Delaware corporation whereas petitioner Magnolia Petroleum Company is a Texas corporation (R. 36, 168, 169, 674). The matter in controversy between those two parties is in excess of $3,000.00 (R. 258, 259). Hence, between them there existed an additional ground for Federal Court jurisdiction of the controversy and it was so alleged (R. 3-4, 103-104).

There were three separate causes of action of the respondent against the petitioners, who each made separate contracts. Instead of instituting a separate action against each of the petitioners as it undoubtedly could have, the respondent combined the actions under Rule 20(a) of the Federal Rules of Civil Procedure because the right to relief arose out of the same transaction or series of transactions

and involved common questions of law and fact. For convenience we here quote the applicable portions of that rule:

> * * * All persons may be joined in one action as defendants if there is asserted against them jointly, *severally*, or in the alternative, *any right to relief* in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities."

Although the actions may be so combined for convenience and facility, "The causes remain as separate and distinct as if commenced separately." *Lansburg & Bro.* v. *Clark* (App. D. C.), 127 Fed. (2d) 331. See also, *Fechheimer Bros. Co.* v. *Barnwasser* (6 Cir.), 146 Fed. (2d) 974; *Diepen* v. *Fernow* (D. C. Mich.), 1 F. R. D. 378; *Nat'l Surety Corp.* v. *City of Allentown* (D. C. Pa.), 27 Fed. Supp. 515; *Sturgeon* v. *Great Lakes Steel Corp.* (6 Cir.), 143 Fed. (2d) 819. See also, R. 243.

If the respondent had brought suit only against the petitioner Magnolia Petroleum Company neither of the other two petitioners would have been necessary or indispensable parties; and regardless of the federal question involved, diversity of citizenship would have existed as a ground for federal court jurisdiction. Consequently, the fact that other separate causes of action were joined for procedural convenience cannot affect the respondent's dis-

tinct and separate rights and judgment as to Magnolia Petroleum Company. As will have been noted, the rule itself provides that judgment may be given "against one or more defendants according to their respective liabilities."

Therefore, if there were no federal question presented by this litigation, the judgment as to the petitioner Magnolia Petroleum Company should not be disturbed. See *Camp* v. *Gress*, 250 U. S. 308, 63 L. Ed. 997; *James-Dickinson Farm Mortgage Company* v. *Harry*, 273 U. S. 119, 122, 71 L. Ed. 569, 573; *Wells* v. *Universal Pictures Co.* (2 Cir.), 166 Fed. (2d) 690, 693; *Lansburg & Bro.* v. *Clark*, *supra*.

Point Two.

The Federal Power Commission Issued to Michigan-Wisconsin Pipe Line Company a Certificate of Public Convenience and Necessity on November 30, 1946, Meeting the Requirements of the Natural Gas Act and Then Authorizing the Construction and Operation of the Proposed Pipe Line Project.

The argument of the petitioners here concedes that if the above proposition is correct, the petitioners were not entitled to terminate their contracts and consequently the judgment below was correct insofar as the merits of the case are concerned (see pages 9-10, 32, 35, 36 of their brief). We shall here show the correctness of the proposition.

The Natural Gas Act

Although the Congress in 1938 enacted the Natural Gas Act for the declared purpose of regulating the business of transporting and selling natural gas in interstate and foreign commerce (15 USCA 717), it was not until 1942 that Congress determined that certificates of public con-

venience and necessity should be obtained for all interstate gas pipe lines. 15 USCA 717f(e)-(h). Prior to the amendment an interstate line could be built anywhere into an area that was not then being served by another line but once it was constructed it became subject to the regulatory powers of the Commission. By the 1942 Amendment Congress provided that before any interstate gas line could be constructed the company proposing the project must first file before the Commission an application for a certificate of public convenience and necessity and have it determined by the Commission, before the line is built, that the public necessity requires the new line and that the applicant appears to the Commission to be able and willing to perform the service. For convenience, we here quote that portion of the Act, as amended, which sets forth the basis for the grant of a so-called certificate of public convenience and necessity:

> "* * * a certificate *shall* be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension or acquisition covered by the application, *if* it is found [1] that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the chapter and the requirements, rules, and regulations of the Commission thereunder, and [2] that the proposed service, sale, operation, construction, extension or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied." 15 USCA 717f(e).

Thus the determination which is to be made in granting or denying a certificate was set forth and, as will have

been noted, when the two factors enumerated in the Act are found to exist the Commission "shall" issue a certificate. This, it has been termed, is the "general mandate" in the Act. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission* (App. D. C.), 169 Fed. (2d) 881, 884, *cert. den.* 335 U. S. 854; 93 L. Ed. Adv. Sh. 39 (upholding the certificate here involved).

The Act as amended not only provides for the continued regulation of an interstate line after a certificate is issued but also specifically provides for the imposition by the Commission of conditions in presently issuing a certificate, as we point out more fully later.

The "grant" of a certificate, the "issuance" of a certificate, a favorable "decision" upon the application for a certificate, are used synonymously in the Act. 15 USCA 717f(c), (e), (g). A certificate is issued by the Federal Power Commission by the making of an order finding the two factors mentioned and granting a certificate. *Department of Conservation* v. *Federal Power Commission* (3 Cir.), 148 Fed. (2d) 746, *cert* den. 326 U. S. 717, 90 L. Ed. 424; *Kentucky Natural Gas Corporation* v. *Federal Power Commission* (6 Cir.), 159 Fed. (2d) 215. See also, *Panhandle Eastern Pipe Line Co.* v. *Securities and Exchange Commission* (8 Cir.); 170 Fed. (2d) 453, wherein the Court, in speaking of the order here involved pointed out (454): "On November 30, 1946, the Federal Power Commission *issued* a certificate of public convenience and necessity to the Michigan-Wisconsin Pipe Line Company * * *." And, later (456): "That certificate, as heretofore stated, was *granted* November 30, 1946."

On November 30, 1946, the Commission Made the Decision Required by the Act and Its Intent to Then Issue a Certificate Is Clearly Established.

The Commission did not find on November 30, 1946, that if certain conditions later developed it would find the two statutory requisites to exist or that it would later issue a certificate. Quite on the contrary, the Commission found the two requisites to exist on that date (R. 439-441) and, as was its statutory duty to do, it then issued a certificate (R. 441-445). That which the Commission was charged by Congress to do in issuing a certificate was "completed" on November 30, 1946.

Nevertheless the petitioners would have it believed that the Commission did not intend to do anything "effective" on November 30, 1946, and therefore did not intend to issue a certificate on that date.

The events leading up to the order of November 30, 1946, the unequivocal language of the order itself, as well as subsequent orders of the Commission, leave no doubt, we submit, but that the Commission intended to issue a certificate on November 30, and did in fact do so.

a. Events of Culminating in the Order

The proceedings before the Federal Power Commission were necessarily involved, considering the magnitude of the project proposed, requiring months to complete (R. 172, 394). Michigan-Wisconsin, although proceeding diligently, was faced with determined resistance, principally from Panhandle Eastern Pipe Line Company, which company was supplying to a limited extent only two of

the many areas into which Michigan-Wisconsin proposed to bring gas, the Detroit and Ann Arbor areas (R. 485). That company sought to defeat the project so as to be assured of a monopoly in the supply of gas in the two areas mentioned, although it could not adequately supply them (R. 440, 506-514, 545). Its counsel did all that they could to prevent the issuance of a certificate and the proceedings were prolonged (R. 394, 477-479). Hearings on the application commenced in January, 1946 (R. 394), the next month after the contracts here involved were executed; the taking of evidence was finally concluded on November 13, and arguments were concluded on November 23 (R. 172, 394). The Commission of course had before it the matter of reserves, one of the features vital to the project (R. 491-494). The deadline (December 1) in order to preclude the exercise of the options to terminate the contracts whereby those reserves were guaranteed was rapidly approaching. The Commission drove toward that deadline. It so happened that December 1 fell on Sunday. The Commission continued its deliberations and the matter of the formulation of its order through Saturday, not ordinarily a working day (Rules of Practice and Procedure, Rule 1(b), 18 C. F. R. 1.1; R. 287-288, 357). On that day the Commission concluded its formulation of its order and then reduced it to writing in full, exact and complete form (R. 172, 325, 338-344). It then determined that public convenience and necessity demanded the project and that Michigan-Wisconsin was able and willing to perform the service, and accordingly ordered that "a certificate of public convenience and necessity be and it is hereby issued" to Michigan-Wisconsin (R. 441, 445-446). The Secretary then

sent out telegraphic notices to all interested parties that the Commission had adopted its order issuing a certificate, with conditions, to Michigan-Wisconsin, the first of such notices having been dispatched after seven o'clock that evening (R. 173, 357, 455). Releases to the press were then made (R. 173, 607-608). Notwithstanding such action on the part of the Commission to decide the application and issue a certificate and thereby meet the deadline in the petitioners' contracts, the petitioners argue that the Commission did all of that for naught and without purpose; that the Commission really did not intend to decide the application or to issue a certificate on that date!

b. The Order Itself.

Clear and unmistakable language was used in the order of November 30 showing that the Commission intended to and did then issue a certificate.

In its findings (R. 439-441) the Commission found that Michigan-Wisconsin "*is*" able and willing to perform the service and that the "construction and operation of the facilities by applicant [Michigan-Wisconsin] *are* required by the public convenience and necessity" (findings 6 and 7). The Commission further recited (finding 8): "It is neither necessary nor appropriate *at this time* to authorize the construction proposed by applicant *beyond* the requirements necessary to permit the commencement of the initial operations as contemplated in the application * * *." Having made the findings which by mandate of Congress required the Commission to then issue a certificate, the order continues:

"The Commission, therefore, orders that:

"(A) A certificate of public convenience and necessity *be and it is hereby issued to Applicant* upon the terms and conditions of this order, *authorizing* it to:

"(1) *Construct and operate* the following facilities:"

Then followed a description of those facilities.

The words "*be and it is hereby issued*" mean "a grant *in praesenti*." They "*can have no other meaning*," to use the language of this Court. The *Deseret Salt Company* v. *Tarpey*, 142 U. S. 241, 249, 35 L. Ed. 999, 1002.

Although the language mentioned would seem to be sufficient to clearly show a present grant, the further portions of the order are replete with language also so showing.

The order continues (R. 442):

"(B) *This* certificate *is granted* to applicant upon the following terms and conditions:

"(1) The facilities *herein authorized* shall not be used for the transportation to or sale of gas in any community * * * other than those named in the application * * *."

Throughout the conditions terminology such as "the facilities *herein authorized*," conditions (ii) (v) (vi) (viii) and (x); "the grant of the certificate *herein authorized*," condition (iii), "*This* certificate *is granted*," condition (viii), "the certificate as *herein issued*," condition (ix), and "the operations *herein authorized*," condition (xii), was used.

It is difficult to see how more explicit language could have been employed by the Commission to express a present grant or issuance of a certificate.

c. Subsequent Orders

Subsequent official expressions of the Commission also show clearly that the Commission intended its action and order of November 30, 1946, to constitute the then issuance of a certificate.

In the order of December 14, 1946 (R. 462), this language is used:

> "Upon consideration of the Commission's order of November 30, 1946, *issuing a certificate* of public convenience and necessity pursuant to Section 7 of the Natural Gas Act, as amended, authorizing, * * *."

Similar language was used in the order of May 6, 1947 (R. 583).

In the closing paragraph of the order of December 30, 1946, the Commission stated (R. 475):

> "Nothing contained in this order shall be construed as in any manner changing or affecting the Commission's order adopted November 30, 1946, *issuing a certificate* of public convenience and necessity to Michigan-Wisconsin Pipe Line Company as herein supplemented."

The supplemental order of February 20, 1947 (R. 555) recites:

> "Upon consideration of the record herein, the Commission's Opinion No. 147, the order of November 30, 1946, *issuing a certificate of public convenience and necessity*, to the Michigan-Wisconsin Pipe Line Company * * *".

Thus, we submit that the Commission's intent to issue a certificate on November 30, 1946, is unmistakably and convincingly shown.

The Imposition of Conditions Did Not Preclude the Present Issuance of a Certificate.

Immediately following that portion of the Act which we have quoted above prescribing that the Commission shall issue a certificate if it finds that an applicant is able and willing to perform the proposed service and that the public necessity and convenience requires the service, Congress provided:

> "The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." 15 USCA 717f(e).

It would have been surprising, indeed, if the Commission had not imposed conditions in granting the certificate here involved (particularly considering the magnitude of the project) because, in accord with and as expressly provided for in the Natural Gas Act, it has been the long established practice of the Commission to impose conditions in granting certificates of public convenience and necessity.[1]

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[1] Tennessee Gas and Transmission Co. (Sept. 24, 1943), 3 F. P. C. 574; Cities Service Transportation and Chemical Co. (Sept. 30, 1943), 3 F. P. C. 598; Natural Gas Pipeline Co. et al. (March 21, 1942), 3 F. P. C. 559; Mt. Morris Gas Co. (Sept. 28, 1943), 3 F. P. C. 818; Memphis Natural Gas Co. (Nov. 21, 1944), 4 F. P. C. 187; United Gas Pipe Line Co. (July 5, 1945), 4 F. P. C. 307; United Gas Pipe Line Co. (Oct. 13, 1943), 4 F. P. C. 386; Tennessee Natural Gas Lines, Inc., et al. (Dec. 29, 1945), 4 F. P. C. 1127; The Manufacturers Light & Heat Co. (Dec. 29, 1944), 4 F. P. C. 821; Kansas-Colorado Utilities, Inc. (July 24, 1945), 4 F. P. C. 1026; Cities Service Gas Co. et al. (May 29, 1945), 4 F. P. C. 922; Cities Service Transportation and Chemical Co. and Cities Service Gas Co. (July 22, 1944), 4 F. P. C. 649; Tennessee Gas and Transmission Co. (June 8, 1945), 4 F. P. C. 293; Panhandle Eastern Pipe Line Co. (March 31, 1945), 4 F. P. C. 262; Hope Natural Gas Co. (Apr. 26, 1944), 4 F. P. C. 59; United Gas Pipe Line Co. (August 14, 1942), 3 F. P. C. 186; Louisiana-Nevada Transit Company (July 18, 1939), 2 F. P. C. 546; Kansas Pipe Line & Gas Company and Nebraska Natural Gas Company (April 8, 1941), 2 F. P. C. 917; Gas Transport, Inc. (Nov. 28, 1941), 2 F. P. C. 1097; The Ohio Fuel Gas Co. and Panhandle Eastern Pipe Line Co. (Oct. 2, 1942), 3 F. P. C. 301; United Gas Pipe Line Co. (August 19, 1943), 3 F. P. C. 551

The extent to which the Federal Power Commission has imposed conditions in issuing certificates of public convenience and necessity is illustrated by the following excerpt from the Report of the Committee on Natural Gas in the Proceedings of the Section of Mineral Law (October 29, 1946) of the American Bar Association, page 100:

> "The authority in proper cases to attach conditions to the issuance of certificates has been exercised with such regularity that it now has become *standard*[1] practice with the Commission to control all manner of activities and operations."

The conditions imposed were upon the exercise of the rights granted under the certificate. For the petitioners to say that the conditions precluded the order from being then "effective" and therefore no certificate was then issued authorizing the construction and operation of the pipe line project is to argue that the Commission cannot make a present grant of a certificate if conditions are imposed upon the exercise of the rights granted. This, contrary to the provisions of the Act and to what the Commission did in this instance in line with its established policy.[2]

By the Order of November 30, 1946, Michigan-Wisconsin Had the Authorization of the Commission to Immediately Commence the Project.

The Act does not contemplate that there be two certificates for a proposed pipe line project. On the contrary, if

[1] Italicized in the report.

[2] Even prior to the 1942 amendment expressly authorizing conditions it was recognized that authority of the Commission to attach conditions to the issuance of a certificate was inherent in the nature of the Commission's regulatory function under the Act. **Arkansas-Louisiana Gas Co. v. Federal Power Commission**, 5 Cir., 113 Fed. (2d) 281.

the two specified findings are made that which is to issue is a certificate to construct *and* operate the line. 15 USCA 717f(c), (e). The certificate which was granted by the Commission on November 30, 1946, was not a certificate to merely construct the line, but was, as the Commission expressly termed it, a certificate "authorizing" Michigan-Wisconsin "to *construct and operate the following facilities*," the facilities being the pipe line system which was described (R. 441).[1] That certificate, that grant, that right, was one. If it could be exercised immediately it was immediately in being. Conditions imposed would necessarily be upon the exercise of the rights *granted*.

A very considerable amount of time would necessarily elapse between the commencement of construction and the commencement of operations, as approximately 1,600 miles of pipe line of large size dimensions were to be built (R. 437). By the conditions imposed in its order, paragraph (B) (R. 442), the Commission required that certain things be done before the actual operation of the line was commenced. Such language as this was used: "That there shall be no transportation or sales of natural gas * * * by means of the facilities herein authorized * * *."

No such restriction was made insofar as the authorization to construct was concerned. The Commission authorized immediate construction. This is made clear by the order issuing the certificate, portions of which we have quoted in the preceding section and which we shall not here repeat.

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[1] In **Panhandle Eastern Pipe Line Co. v. Securities & Exchange Commission, supra** [170 Fed. (2d) 453, 460], the Court in dealing with the order here involved said: "The Federal Power Commission had before it the entire project. Its approval of the feasibility of the project cannot properly be limited to the 'initial operations' thereof."

It is made doubly clear by finding No. 8 (R. 441) wherein the Commission pointed out "It is neither necessary nor appropriate *at this time to authorize* the construction proposed by applicant *beyond* the requirements necessary to permit the commencement of the initial operations as contemplated in the application * * *."[1] This, of course, meant that it was necessary and appropriate "at the time" (November 30, 1946) to authorize the construction proposed by applicant, etc. The Commission then proceeded to so authorize. Insofar as authorization from the Federal Power Commission was concerned Michigan-Wisconsin could have started construction on the night of November 30. By the order of that date Michigan-Wisconsin was not only given immediate authorization to commence construction, it was required to commence construction by a specified date (condition x, R. 444). The construction of the extensive project was in fact commenced under the authorization of the certificate as issued by the Commission in its order of November 30, 1946 (R. 189-190, 602). The certificate authorizing the "construction and operation" of the proposed pipe line project was on November 30, 1946, then "effective" even under the theory argued by the petitioners here.

To be sure, before the actual work of construction could be started, other things had to be done but not insofar as authorization from the Federal Power Commission was concerned. The necessary finances had to be arranged for, and the plan therefor had to be approved by the Securities and Exchange Commission under another and different act of Congress since a holding company was involved. The

[1] For a description of the initial operations of the project contemplated in the application see our discussion post page 69-70

Federal Power Commission so provided in its order, which would have been the case whether recited in the order or not. 15 USCA 79 *et seq.* But this did not mean that immediate authorization from the Federal Power Commission was not given or that insofar as its permission was concerned Michigan-Wisconsin could not proceed immediately with the project. This did not mean that one commission does not or cannot authorize until the other does. "Congress had not confronted the two commissions with a dilemma like that created by the famous municipal ordinance requiring that when two trains approach a grade crossing at the same time, both shall stop and neither shall proceed until the other has proceeded." *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, *supra*, 169 Fed. (2d) 881, 883. See also *Panhandle Eastern Pipe Line Co.* v. *Securities and Exchange Commission* (3 Cir.), 170 Fed. (2d) 453, approving the plan of financing of the project here involved. The petitioners bargained for favorable action of only the Federal Power Commission.

The requirement to the effect that before the facilities could be used certain local authorizations would have to be obtained in Wisconsin for the conversion from manufactured gas to natural gas in several municipalities in that state, was likewise one that would have been the case whether recited in the order or not (Condition B ii, R. 442). The Natural Gas Act did not purport to usurp state jurisdiction of local features. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591, 609, 88 L. Ed. 333, 349.

It was the orderly course to pursue to first obtain the required authorization of the Federal Power Commission

in the form of its certificate before proceeding to obtain authorization from other bodies. Until the Federal Power Commission decided that the public necessity required the proposed pipe line system and that it appeared to the Commission that the particular applicant was able and willing to perform the proposed service, and issued its certificate accordingly, the line could not be built. Before the Securities and Exchange Commission would approve a plan of financing involving millions of dollars it would no doubt have required that it first be determined whether the project could be materialized. Likewise, before the local authorities in Wisconsin would permit the conversion from manufactured gas, the logical result would be that it would have first required that authorization of the project by the Federal Power Commission be obtained so as to make possible the new supply of gas. For an applicant to make it appear to the Commission that he is "able and *willing to do* the acts and perform the service" does not mean that it must appear that an applicant "*has done* all things necessary to perform the service." *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission, supra.* See also *Pan American Airways Co.* v. *Civil Aeronautics Board* (2 Cir.), 121 Fed. (2d) 810, 817.

Condition B(viii) Concerning Panhandle Eastern's Rights Did Not Purport to Defer the Issuance of a Certificate, and Did Not in Fact Do So.

A map of the project proposed by Michigan-Wisconsin appears in the record at page 437. From it the considerable area to be served can be readily seen. Michigan-Wisconsin proposed in its application this project (R. 402, 428, 431,

480-481): A line extending from the Hugoton Field to two gas fields to be used for underground storage purposes, the Austin and Reed City Storage Fields in Michigan, in which tremendous quantities of gas could be stored and withdrawn as needed thus giving an uninterruptible supply (R. 402-403, 483). The line was to branch in Illinois and then extend also into Wisconsin, as far north as Grand Bay. Connections were to be made by lateral lines at intervening points in Missouri and Iowa. At the start of operation Michigan-Wisconsin was to construct two compressor stations, one in the Hugoton Field and one in Iowa (R. 432). The foregoing was all of the construction proposed by Michigan-Wisconsin "for the commencement of initial operations," referred to in finding 8 of the November 30 order (R. 441). The additional construction to be done by Michigan- Wisconsin was the installation later of additional compressor stations along its line as the demand increased (R. 432, 481). It was proposed in the application that, in addition to the facilities to be constructed by Michigan-Wisconsin, gas be supplied by Michigan-Wisconsin from the storage fields mentioned through a line to be constructed by Austin Field Pipe Line Company, an affiliate of Michigan-Wisconsin, extending from the storage fields to Detroit and Ann Arbor (R. 402).

The contracts of the petitioners did not call for the entire project mentioned; the contracts referred to no particular application. All that they called for was "a pipe line system" from a point in the Hugoton Field "to points of connection with distribution systems in Michigan and Wisconsin, *or either of them*, and at intermediate points" (R. 36). Thus, had the project been approved so as to

exclude the Detroit and Ann Arbor markets, or for that matter the entire state of Michigan, it would have met fully the petitioners' contracts.

The evidence established "a great public need for gas in the area to be served by" Michigan-Wisconsin (R. 509). This, aside from the Detroit and Ann Arbor markets. A "combined population of more than 1,388,000 people will for the first time secure the benefits to be derived from the introduction of natural gas in the communities in Wisconsin, Iowa and Missouri" (R. 511). A quite substantial market existed in the western district of Michigan (R. 487). Increased future demands were to be expected when the service was made available in the area (R. 509).

The issue presented by Panhandle Eastern resolved itself insofar as the Commission was concerned into a question of whether that company should be permitted to continue to exclusively supply the Detroit and Ann Arbor markets by virtue of its previous certificate or, instead, was the demand in those two markets sufficiently great that Panhandle Eastern had not and could not adequately supply them and therefore the supply should in the public necessity be augmented by Michigan-Wisconsin (R. 440, 506-514).

The evidence was clear and convincing on that issue. Panhandle had not and could not adequately supply Detroit and Ann Arbor (R. 440, 508-511). The situation was so acute in those two markets that previously emergency measures had been set up in advance providing for an equitable distribution of gas to take care of essential needs of those dependent on Panhandle's supply in instances of extreme shortages (R. 508). "All parties to such proceed-

ings, including Panhandle, readily acknowledged the fact that the demands on the latter's system greatly exceed the sales capacity of existing facilities" (R. 508). The insufficiency of supply was so critical that "State regulatory commissions have taken formal action in order to restrict and discourage the public from using gas for space-heating purposes" (R. 509). Large demands were being made elsewhere on Panhandle's system (R. 516-518).

The Commission had all of the evidence, including that mentioned above in this section, before it on and prior to November 30.[1] At that time it found that not only was there a large demand elsewhere for gas to be supplied by the proposed system (finding 2, R. 439) but also, that Panhandle had not and could not adequately supply the Detroit and Ann Arbor markets and that it was apparent that the supply in those two markets should be augmented by the Michigan-Wisconsin system (finding 3, R. 440). The Commission concluded that finding by stating: "Augmentation of the supply of natural gas to the market areas here in question through the facilities proposed to be constructed and operated by applicant will be in the public interest, provided proper protection and recognition are given to Panhandle's rights and obligations in said Michigan market. An appropriate condition should be provided for the purpose."

The proviso mentioned is not to be given strained construction. Particularly so in view of the rule that adminis-

[1] Although a transcript of the evidence before the Commission is not in the record in this case, the Commission reviewed in detail in its opinion of January 17, 1947 the evidence which had been presented at the hearing which had been concluded prior to the November 30 order. The citations are to that opinion.

trative orders are not to be given a restricted and highly technical construction but should be liberally construed to accomplish the purpose apparent in their substance and, where it can be, such an order will be given a construction which will support the validity and effectiveness of the order. *Baltimore and Ohio Railroad Co.* v. *United States*, 304 U. S. 58, 82 L. Ed. 1148; *Chicago M. St. P. & P. R. Co.* v. *United States* (D. C. Ill.), 33 Fed. (2d) 582, 586.

Suppose the Commission had recited in its findings that the public convenience and necessity requires the project "provided proper rates are charged and an appropriate condition will be made in this order for that purpose," and, after granting a certificate imposed a condition that before gas could be transmitted in the system satisfactory rates would have to be charged and the matter of what those rates shall be may be determined later. Would that mean that it was not then determined that public convenience and necessity required the system proposed by the applicant? Clearly not, we submit, and it has been so held because that was in substance the order of November 30. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, *supra*.

The Commission did not here say on November 30 that it might or would *find later* that public necessity required augmentation of the supply in Detroit and Ann Arbor if it could later be determined that Panhandle's rights could be protected. On the contrary, it found that not only areas unserved required the system but also that the Detroit and Ann Arbor markets must be augmented; that public necessity demanded the service and the project should be materialized and Michigan-Wisconsin should be

then authorized to commence its construction. It found, however, that insofar as the Detroit and Ann Arbor markets were concerned in augmenting the supply Panhandle's rights should be protected, they could be protected, and they would be protected by the Commission.

Consonant with the findings, the Commission after issuing a certificate provided, by way of condition B viii, that gas from the Michigan-Wisconsin system would not be resold in the Detroit and Ann Arbor markets "except with due regard to the rights and duties of Panhandle Eastern in its established service for resale in Detroit and Ann Arbor, Michigan, under its presently existing contract with Michigan Consolidated and in accordance with the provisions of the Natural Gas Act * * *." Suppose that the condition had stopped there. Could it have been argued that the condition vitiated the certificate or precluded one from being presently issued? We submit that clearly it could not. It would have been merely the imposition of a condition upon the exercise of the rights under the certificate issued, as expressly authorized by Congress. It would have been no different than the condition, in substance, to the effect that the facilities would not be used except upon charging proper rates. To be sure, subsequent action of the Commission in either of the respects mentioned would not be foreclosed, but by the very nature of the Natural Gas Act subsequent action, continuing regulation, on the part of the Commission is not foreclosed, subject of course to the constitutional prohibition against arbitrary action. As we shall subsequently show in discussing the supplemental order, further action on the part of the Commission concerning Panhandle's rights is even now provided for.

Why should the situation be any different because of the fact that in its condition the Commission went further and provided that instead of at some indefinite date, a supplemental order would be issued within a stated time fixing more precisely the rights of Panhandle in the two markets mentioned upon the three bases then stated in the condition? We submit that it should not be. Inasmuch as the Commission could have left to the indefinite future the determination of the precise rights of Panhandle in the Detroit and Ann Arbor markets (as it did the matter of proper rates), its decision to make a more definite determination of that question at a fixed time could not possibly render ineffective its decision that the certificate should issue on November 30, 1946. There was not left to be decided the question as to whether the Detroit and Ann Arbor supplies should be augmented by Michigan-Wisconsin. It had been determined that they should be to a substantial extent. A more precise fixation of the rights of Panhandle based upon the factors enumerated by the Commission was not necessary to a determination at the time (1) that public necessity required the project proposed by Michigan-Wisconsin and (2) that Michigan-Wisconsin was able and willing to perform the service and the consequent, immedite grant of a certificate.

The Commission did not intend to withhold its order that Michigan-Wisconsin should be, and was, then granted a certificate, dependent upon the issuance of a supplemental order. Aside from the clear and unequivocal language of the order, including the condition in question, for what purpose would the order of November 30 (made at a Saturday session of the Commission) have been made if not

for the purpose of then granting a certificate? If it was not intended that the order have any significance until the more precise extent to which Panhandle's rights were to be protected was fixed, the Commission would have withheld any order until those rights were thus defined.

The supplemental order of February 20, 1947 (R. 555), did not purport to be for the first time the issuance of a certificate. It was merely what its terms several times recite it to be, one "supplementing" the order of November 30, 1946. The latter order is referred to in the supplemental order as "the order of November 30, 1946, issuing a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company." All that the order purports to do is to amplify the bases upon which Panhandle's rights were to be protected in the Detroit and Ann Arbor markets. And even then those rights were not fixed with complete exactness or finality. The order concluded with a paragraph (B) to the effect that the provisions of the supplemental order were to be "without prejudice to the filing of applications by either Panhandle, Michigan-Wisconsin or Michigan-Consolidated for modification or termination thereof," provided Panhandle's pattern of service as "outlined" in the order should not be affected "so long as Panhandle is able and willing to maintain adequate service in conformance therewith." Thus, if the argument of petitioners were valid to the effect that until Panhandle's rights were fixed with exactitude and finality the Commission did nothing effective, there would be no certificate, nothing "effective," today. It has been held to the contrary. *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission*, *supra*, wherein the Court pointed out [169 Fed-

(2d) at 884, note 7]: "Moreover the Commission's order as we read it reserved to the parties including Panhandle the right to file applications at any time, and from time to time, for modification or termination of the conditions." The conditions referred to were the provisions of the supplemental order.

Paragraph C Pertained Only to the Matter of Rehearing.

Paragraph C of the November 30 order did not purport to detract from the clear evidence and the positive expression of the Commission's intention to grant a certificate on that date. It was not designed to vitiate or render ineffective all that had been done, found and ordered by the Commission, as it seems plainly to say.

After providing in condition B viii of the November 30, order for the supplemental order to be made for the limited purpose of specifying more precisely the rights mentioned of Panhandle, the Commission desired to render it unnecessary for Panhandle to take an appeal from the order granting a certificate until the supplemental order had been issued and the opinions filed in the case. This obviously was for the purpose of precluding the necessity of "piece-meal" appeals encountered in *Northwestern Electric Co. v. Federal Power Commission* (9 Cir.), 125 Fed. (2d) 882. The Commission desired that Panhandle Eastern be permitted to take to the Appellate Court the entire proceeding insofar as Panhandle Eastern's rights were concerned. It there-

fore provided for an extension of the time within which to file a petition for rehearing.

Thus the Commission inserted in its order paragraph C. The petitioners would have it believed that the Commission *intended* by that paragraph to postpone the entire order—to render "ineffective" at the time all that it had previously found and ordered. The importance of the Commission's intent is made manifest by the provision of the Natural Gas Act reading: "Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe." 15 USCA 717o. The intent of the Commission is controlling in determining what it has prescribed for the effective date. In addition to the statutory provision mentioned, see *Whittier* v. *Whittier*, 237 Iowa 655, 23 N. W. (2d) 435, and *Gila Valley Irrigation District* v. *United States* (9 Cir.), 118 Fed. (2d) 507, 510. Hence petitioners insistence, against overpowering odds, that the Commission intended to postpone the issuance of a certificate.

We believe that we have previously shown that the argument of petitioners to the effect that the Commission did not intend to issue, or grant, a certificate on November 30, 1946, is clearly refuted by the events leading up to the order of November 30, 1946, the positive language of the order itself, as well as subsequent orders of the Commission (Ante, pp. 59 to 63). Contrary to petitioners' contention, that paragraph is consistent with an intention of the Commission to presently issue a certificate and inconsistent with a contrary intent.

Paragraph C obviously was *intended* merely to extend the time for rehearing. It contains express words of limitation: "*For the purpose of computing the time within which applications for rehearing may be filed*, the date of issuance of this order shall be deemed to be the date of the issuance of the opinions, or of the supplemental order referred to herein, whichever may be the later." The qualifying words of the paragraph "For the purpose of" exclude the intended operation or effect of the paragraph beyond that which is stated, namely, to fix a time within which petitions for rehearing may be filed. *Vinson* v. *Pelletier*, 78 Mont. 254, 255 Pac. 1067, at 1072. The petitioners would ignore the effect of the controlling language mentioned and say in end result that paragraph C was intended to mean that "*for all purposes*" the order of November 30 was to have no effect, and was to be of no significance until a supplemental order was filed. In doing so they take a position flatly contrary to the plain, unmistakable language of paragraph C itself, as well as the other language of the order and the obvious intent of the Commission. It is to be noted also that the Commission used the words "shall be deemed to be" instead of "shall be". We submit that those words were used here in this sense: "When a thing is to be 'deemed' something else, it is to be treated as that something else with the attendant consequences, but it is not that something else." 1 Bouvier's Law Dictionary, page 814. See also *Hardier* v. *Irwin*, (D. C.-N. Y.), 285 Fed. 402, 406.

The petitioners suggest that the opinions referred to in paragraph C were to constitute the findings and thus argue that the Commission did not intend to issue its certificate until the opinions were filed. Here again the argument

is clearly refuted by the terms of the order itself. The action of the Commission of November 30 was in two parts. In fact its writing of that date was entitled "Findings and Order Issuing Certificate * * *." It began with the recitation: "Upon consideration of the application, as amended, and the record thereon with respect to the matters involved and the issues presented, the Commission finds that:" (R. 439). Then are set forth the eight findings of the Commission. The order issuing the certificate was intended to be, and was, based upon those findings, not some to be made later. After setting forth the findings, the Commission continued: "The Commission, therefore, orders that:" Then is set forth the order portion of the Commission's action of November 30. The subsequent opinions were not necessary to constitute the required findings, nor were they intended to be. The Commission had made its findings on November 30 and after setting them forth rendered its order accordingly. Moreover, "the opinions" contemplated were both "Supporting and dissenting opinions" (R. 445). Certainly, the Commission did not intend that the dissenting opinion was necessary to support or complete the action of the Commission (the majority) taken on November 30. The opinions were no more necessary to the validity or effectiveness of the order here, nor were they intended to be, than an opinion rendered in a case by a United States Court after, and in addition to, findings of fact and conclusions of law upon which a judgment is rendered. See *Radio Corp. of America* v. *Decca Records, Inc.* (D. C. N. Y.), 51 Fed. Supp. 493, 494. Presumably the Commission desired that its opinion (the majority) as well as the dissenting opinion, wherein the analyses of the evidence and

reasoning advanced (both pro and con) would be available for consideration in the event of a review.[1]

It may be that the Commission doubted its authority to extend the time for filing petitions for rehearing and preferred not to challenge attention to its possible lack of authority by bluntly stating that the time for filing petitions for rehearing was extended. Whatever its motive, it is clear that the Commission intended that the order granting the certificate should become immediately effective for all purposes except for filing petitions for rehearing.

It may be that while professing to deal with the intent of the Commission petitioners are really advancing the thought that notwithstanding the Commission's desire and intent presently to issue a certificate on November 30, 1946 (and thereby preclude cancellation of petitioners' contracts with the consequent loss of a large part of the gas reserves dedicated to the project and thus make moot the ten-months hearing before it) by the use of certain language in the order the Commission precluded its own desire and intent from becoming effective. Reduced to its last analysis, petitioners' contention seems to be that the Commission could not presently issue a certificate and postpone the time for filing a petition for rehearing beyond the 30 days

[1] Reference was also made by petitioners as indicative of the Commission's intent to the order of January 14, 1947 (R. 694). By that order the Commission merely held that "good cause" had not been shown why applications for rehearing should be considered in advance of the time specified in paragraph C and that to grant them prior to that time "would invite a multiplicity of pleadings and proceedings herein" (R. 696). Accordingly such applications were denied without prejudice to filing them at the time provided for in paragraph C. It would seem clear that the January 14 order did not purport to indicate that by virtue of paragraph C a certificate had not been issued on November 30. In fact it shows plainly to the contrary. The order begins: "By its order of November 30, 1946, the Commission issued a certificate of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act * * *"

allowed by the statute; that a certificate cannot be issued on November 30 for the purpose of becoming effective and be "deemed to be issued" at a later date for the purpose of computing the time for filing a petition for rehearing, and therefore it must "be deemed to be issued" at the later date for all purposes.

It is by no means certain that the Commission lacks authority to extend the time for filing petitions for rehearing. The statute provides: "any person * * * may apply for a rehearing within thirty days * * *." 15 USCA 717r which may be an effective guarantee of that much time, but is far from saying the Commission may not allow additional time. The use made of the word "may" connotes no mandatory time to the extent of precluding the Commission from extending the time: See *Lansdown* v. *Faris* (8 Cir.), 66 Fed. (2d) 939, 941. Particularly should this be so where, as here, in the same Act, Congress provided that "Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe." The Act should not, we submit, be given the strict construction to the effect that the time for rehearing and consequent appeal "must" be within the time stated, regardless of an extension by the Commission. We cite as an analogous decision *Braniff Airways* v. *Civil Aeronautics Board* (App. D. C.), 147 Fed. (2d) 452. In that case a fixed time was prescribed by Congress for the perfection of an appeal. The Act provided that an appeal shall be taken "within sixty days after the entry of the order." No provision whatever was made in the Act for a rehearing. Yet it was held that a petition for rehearing filed pursuant to the rules of the Board extended the time for appeal to

that the appeal should be perfected within sixty days from the date on which the rehearing was denied. This language was used: "For the purpose of review, therefore, there was no final order until the rehearing was denied."

Certainly, it is not sufficiently clear that the Commission was without power to extend the time for rehearing to warrant the Court in holding that no such power existed when the question is presented in this collateral manner.

But, even though it be conceded *arguendo* that the Commission could not properly provide as it did for an extension of the time for rehearing, and that that is a proper subject of inquiry here, it does not follow that the Commission did not issue, or grant, a certificate on November 30, 1946. It should be borne in mind that the Court of Appeals for the District of Columbia, in holding Panhandle Eastern's appeal premature, took no notice of paragraph C, as we discuss more fully later. That decision in no way affects the argument here made. We doubt that even petitioners would contend that the issuance of the order was postponed if, instead of the phrase "For the purpose of computing the time within which applications for rehearing may be filed, the date of issuance of this order shall be deemed * * *," the Commission had said "Petitions for rehearing may be filed within 30 days from date of issuance of the supplemental order, or of the opinions, whichever is later." That is precisely the effect of the language quoted above. That was more formal, more "legalistic" language, but the intent is clear. *If the Commission had no power to extend the time for filing petitions for rehearing, the extension would fall, rather than carry the entire order over and prevent it from becoming effective.*

To conclude this point the respondent submits that for the reasons herein suggested the Commission intended to issue a certificate to Michigan-Wisconsin on November 30, 1946, authorizing it to construct and operate the pipe line project, and it then did so in compliance with its legislative mandate, although it imposed conditions upon the exercise of some of the rights so granted as it was authorized by Congress to do in presently issuing a certificate.

Point Three.

There Is No Conflict Between the Decision of the Court of Appeals Here and the Order of the Court of Appeals for the District of Columbia.

Contrary to the argument of petitioners, the Court of Appeals in this case did not purport to collaterally attack the order of the District of Columbia Court dismissing Panhandle's appeal as premature, and did not in fact do so. The decision of the Court of Appeals here and the order of the District of Columbia Court were not and did not purport to be "on the same matter," Rule 38(b) of this Court. The two holdings are not in conflict.

To preface our discussion of the appeal which Panhandle first sought to take from the order of the Commission of November 30, 1946, and the disposition which was made of it by the District of Columbia Court, we refer to our presentation of our Point Two and particularly to our discussion of Paragraph B viii and Paragraph C of the order.

Notwithstanding the provision which the Commission made to enable Panhandle to take in one proceeding to a reviewing court the entire disposition of its rights concern-

ing the condition relative to the supply of gas in Detroit and Ann Arbor, Panhandle saw fit to take an appeal to the Court of Appeals for the District of Columbia prior to the issuance of a supplemental order, asserting that it was "aggrieved" by the order of November 30, 1946. In order to appeal a party must show himself "aggrieved" by the order of the Commission. 15 USCA 717r(b).

The extent to which Panhandle was in fact aggrieved would appear in the supplemental order which was to be made more precisely defining its rights. In order for there to be a fuller and more complete fixation of its rights the supplemental order was required. In other words, to present more fully the "grievance" of Panhandle and to enable the Appellate Court to decide in one appeal what action, if any, should be taken concerning that grievance, called for an appeal later wherein the record would include the supplemental order. Moreover, Panhandle was in no danger at that time of irreparable injury as a result of the issuance of the certificate because the construction of the line would take several years. Consequently, the Court of Appeals issued an order of April 21, 1947, dismissing Panhandle's appeal, without prejudice to an appeal when the supplemental order was made more precisely defining Panhandle's rights.

The order of the Court of Appeals for the District of Columbia was that Panhandle had not presented a "final" appealable order then presenting its grievance so as to call for intervention at that time by a reviewing court. The Court did not hold that the Commission had not properly made the statutory findings. It did not hold that the Federal Power Commission had not granted a certificate

of public convenience and necessity to Michigan-Wisconsin to construct and operate the pipe line project. It did not hold that Michigan-Wisconsin was not authorized insofar as the Federal Power Commission was concerned to proceed with the construction of the line on the night of November 30, 1946, as in fact it was.

The argument of petitioners upon this feature is predicated upon their contention that before an order of the Federal Power Commission can be immediately effective it must be "final" in the sense of being immediately appealable. That contention is repudiated by the Natural Gas Act and the decisions on the subject.

Congress did not say that before a certificate can be issued by the Federal Power Commission or before the certificate can be in force the order issuing the certificate must be immediately appealable; it expressly provided otherwise. Had it seen fit to do so, Congress could have made no provision for direct appeal from orders of the Federal Power Commission. It has done so with other administrative agencies. *Estep* v. *United States*, 327 U. S. 114, 90 L. Ed. 567; *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 88 L. Ed. 61; *American Federation of Labor* v. *N. L. R. B.*, 308 U. S. 401, 84 L. Ed. 347.

Not only did Congress prescribe that "Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe," 15 USCA 717o, it provided that before any order of the Federal Power Commission can be appealed from a petition for rehearing must be filed before the Commission. 15 USCA 717r. The reason for this requirement is to permit the Commission to hear

objections to its order and correct any mistakes which it may have made; to withdraw its previous order and make an entirely new and different order if it deems advisable. Thus, it cannot be said that an order is final or appealable insofar as the Commission is concerned as long as there is properly pending a petition for rehearing or as long as the time to file such a petition has not expired. It cannot be said that further action upon the part of the Commission is foreclosed. *Yet the order is nevertheless effective. This is expressly recognized by the Natural Gas Act itself:*

> "The filing of an application for rehearing under subsection (a) *shall not* unless specifically ordered by the Commission, *operate as a stay* of the Commission's order." 15 USCA 717r(c).

As necessarily recognized by that section, if it is not so ordered by the Commission (and it was not here), an order of the Commission is immediately operative and effective when made and adopted and continues so until otherwise set aside by the Commission on rehearing or by a Court of Appeals on direct appeal. Rights and powers given by the order may be exercised. Of course, if an order is not effective, if it has no significance, merely because the Commission has it within its power to act further concerning the order which it has previously made, or because the order is not "final" in the sense of appealability, there would be nothing to "stay." Yet, Congress expressly declared otherwise.

The authorities which petitioners cite do not support their position. The petitioners assert as supportive of their position the decision of this Court in *United States* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, 71 L. Ed. 651, and

several similar decisions. Those decisions are to the effect that an order of an administrative body which grants nothing or which takes nothing away is not final in the sense of being reviewable, such as a valuation order in the *Los Angeles Railroad* case which was to serve only as *prima facie* evidence in subsequent proceedings. The petitioners then argue, contrary to any support whatever in the cases, that it therefore necessarily follows that an order which is not final in the sense of being reviewable grants nothing and takes nothing away. Obviously, erroneous reasoning in reverse. The decisions cited by petitioners are fully in accord with the rule which we shall presently call attention to. For instance, note the manner in which *Myers* v. *Bethlehem Shipbuilding Corp.* 303 U. S. 41, 82 L. Ed. 638, cited by petitioners, was applied in the holding of this Court in *Republic Natural Gas Co.* v. *Oklahoma*, 334 U. S. 62, 92 L. Ed. 1212, which we discuss below.

The petitioners also attempt to use as supportive of their position the majority and minority opinions of this Court in *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 92 L. Ed. 568. We take the petitioners' brief (see page 41) to suggest that it was held in that case that only until an order of the administrative body there involved was final and reviewable by the courts could it become available to the parties, could it grant any privilege or right. Neither opinion expressed any such view. There was involved in that case the matter of a certificate of public convenience and necessity to a citizen carrier to engage in overseas and foreign air transportation. *The Act provided* that applications for such certificates were to be made to the Civil Aeronautics Board but that the orders

of such board were subject to the approval or disapproval of the President "and any decision, either to grant or deny, must be submitted to the President before publication and is unconditionally subject to the President's approval" (333 U. S. at 106, 92 L. Ed. at 573). That which was held to be a prerequisite to any grant of an application was not the finality of the order for the purpose of judicial review but the approval of the President by virtue of the provisions of the Act of Congress. And the majority held that even after approval by the President there could be no review because it involved political discretion beyond the realm of the Court to adjudicate.

The test of when an order of an administrative body is "final" for the purpose of justifying a reviewing court to intervene in the proceedings was set forth by this Court in *Columbia Broadcasting System* v. *United States*, 316 U. S. 407, 425, 86 L. Ed. 1563, 1575:

> "The ultimate test of reviewability is not to be found in an overrefined technique, but in *the need of the review to protect from the irreparable injury* threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control."

This test necessarily recognizes that although an order is not "final" in the sense of being immediately reviewable it is nevertheless "effective" because if it were not there could of course be no injury, no immediate consequence of the order of any character, to say nothing of an "irreparable injury."

At a comparatively recent date, this Court clearly held that an order of an administrative body is effective notwithstanding the fact that it is not "final" for the purpose of review. *Republic Natural Gas Co. v. Oklahoma, supra,* 334 U. S. 62, 92 L. Ed. 1212. There was involved the question as to whether the Corporation Commission of Oklahoma could compel the appellant to connect its pipe line and take gas from a gas field ratably with Peerless Oil and Gas Company, a co-producer in the field. The Commission decided the issue against the appellant and ordered an immediate connection. In its order it provided for a subsequent determination by the Commission of the terms of the taking in the event the parties could not agree. After discussing the principles of "finality" for the purpose of review, the majority of the Court held that the order was not "final" for the purpose of review *although it was immediately operative.* In so doing it was pointed out (334 U. S. at 69-70, 92 L. Ed. at 1220-1221):

> "Certainly what remains to be done cannot be characterized as merely 'ministerial.' Whether or not the amount of gas to be taken by Republic from Peerless can be ascertained through application of a formula, the determination of the price to be paid for the gas if purchased or the fees to be paid to Republic for marketing it if sold on behalf of Peerless, clearly requires the exercise of judgment. *Nor is there any immediate threat of irreparable damage to Republic, rendering postponed review so illusory as to make the decree 'final' now or never.* The Commission's order requires Republic to designate a point on its pipeline at which Peerless might attach a line, and after Peerless had done so to connect it immediately. But it does not appear that the order requires Republic to

commence taking Peerless' gas before the terms of taking have either been agreed upon or ordered by the Commission. Nor does it appear that Republic would have to bear the expense of connecting the pipeline, nor that such expense would be substantial. *Indeed, the incurring of some loss, before a process preliminary to review here is exhausted, is not in itself sufficient to authorize our intervention.* Cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50-52, 82 L. ed. 638, 643-645, 58 S. Ct. 451. But even if the Commission's order were construed to require Republic to take and dispose of Peerless' gas immediatley—and we are not so advised by the State court—there is no ground for assuming that any loss that Republic might incur could not be recovered should the completed direction of the Oklahoma Commission, on affirmance by that State's Supreme Court, ultimately be found to be unconstitutional. *Merely because a party to a litigation may be temporarily out of pocket, is not sufficient to warrant immediate review of an incomplete State judgment.*"

We understand that the minority agreed that an order may be effective although it is not "final" for the purpose of review, but were of the opinion that the order should have been then reviewed as otherwise it would "only prolong an already lengthy litigation unnecessarily and with possible irreparable harm to one party or the other" (334 U. S. at 74, 92 L. Ed. at 1223).

In *Phillips* v. *Securities and Exchange Commission* (2 Cir.), 171 Fed. (2d) 180, 183, the Court in applying its announced rule that "Only final orders of the Commission are subject to review" pointed out that "it is clear that 'final' cannot have the significance of the ultimate termina-

tion" of the proceedings of the Securities and Exchange Commission with which it was confronted. Applyng the above stated rule enunciated by this Court in the *Columbia Broadcasting System* case the appeal from the order there involved was dismissed upon the observation that the appellant would "have plenty of time to voice" his objection in an appellate proceeding before he suffered any irreparable injury. The order involved was nevertheless recognized as being presently effective.

The Court of Appeals which made the order in question has likewise recognized that because "*For the purposes of review*" an order is not "final" it does not follow that the order is not in effect. See *Braniff Airways* v. *Civil Aeronautics Board* (App. D. C.), *supra* (147 Fed. (2d) 152, 153).

Petitioners have seen fit to isolate a portion of the brief filed on behalf of the Commission in this Court relative to Panhandle's appeal and subsequent petition for writ of certiorari (Case No. 147, October term, 1947) and assert that the position therein taken by the Commission's attorneys supports the position which the petitioners here assert. No mention was made by petitioners of such statement as this, several times repeated in substance in the brief (page 12):

> "*On November 30, 1946, the Federal Power Commission issued a certificate of public convenience and necessity to Michigan-Wisconsin Pipe Line Company* by an order which provided that a supplemental order should be issued determining the rights and duties of Panhandle Eastern Pipe Line Company, an intervener, in a part of the market proposed to be served by means of *the certified pipe line*. * * *"

Neither was note taken by petitioners of this portion of the brief (page 12):

> "Indeed petitioner has conceded (R. 53) that several years must elapse before pipe will be available for construction of the new line, so that petitioner was not in any immediate danger *as a result of the issuance of a certificate.*"

The remarks of the Commission's attorneys concerning the purpose and effect of Paragraph C was also ignored. The position of those attorneys relative to that paragraph is shown by this statement in their brief (page 13):

> "The Commission by this proviso 'made it possible to bring whatever was to be brought to court with regard to the Commission's action concerning these petitioners in one appellate proceeding *thus escaping the partial review* found in *Northwestern Electric Co. v. Federal Power Commission*, 9th Cir., 1942, 125 Fed. 2d 882'."

The brief filed on behalf of the Commission not only fails to support the petitioners' argument but repudiates it.

The basis for the argument of petitioners that the two orders are conflicting is the assertion that a holding that an order is not "final" for the purpose of review is by *necessary implication* a holding that the order is not effective for any purpose. Such is not the case. A holding that an order is not "final" for the purpose of review does not amount to a holding that no effective order has been issued, as shown by the authorities above cited, including an opinion of the District of Columbia Court itself. The decision of the Court of Appeals here was that a certificate of public convenience and necessity was issued to Michigan-

Wisconsin on November 30, 1946, then authorizing it to construct and operate the pipe line project. The District of Columbia Court had for decision whether a review should have been entertained at the time Panhandle first appealed. It held that the order was not final for the purpose of review at that time. The District of Columbia Court did not hold, and did not purport to hold, that a certificate had not been issued to Michigan-Wisconsin on November 30, 1946. The two holdings are not in conflict and one does not constitute a collateral attack upon the other.

Point Four.

The Trial Court Did Not Abuse Its Discretion in Refusing to Dismiss This Action.

The attempt to avoid a determination of the merits of this case upon the assertion that the trial court abused its discretion in declining to surrender its jurisdiction, or in staying its proceedings, because of two suits filed in the state court in Travis County, Texas, involved only two of the petitioners, Stanolind and Skelly (R. 97, 67). Magnolia made no such assertion (R. 99). It did not see fit to file suit as the other two petitioners did. It was a Texas corporation and in the suit which it might have filed against Phillips there would have been diversity of citizenship (R. 168, 674).

The trial court here undoubtedly had jurisdiction of this cause notwithstanding the two suits which two of the petitioners separately filed in Travis County, Texas. The

rule is succinctly stated in the leading case on the subject, *Kline* v. *Burke Construction Company*, 260 U. S. 226, 67 L. Ed. 226, as follows:

> "The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded."

Full accord was given by the trial court to the decisions of this Court and of other courts in exercising its discretion in declining to surrender its jurisdiction as to the two petitioners mentioned. This was not a case where the issues could "be better settled" in the proceeding pending in the other court, as discussed in *Brillhart* v. *Excess Ins. Co. of America*, 316 U. S. 491, 495, 86 L. Ed. 1620, 1625.

The *Brillhart* opinion clearly recognizes that where a suit in a federal court (1) is "governed by federal law", (2) involves different parties, or (3) could be more conveniently, or with more facility, tried out in the federal court, the discretion of the Court should not be exercised by dismissing the suit, but instead the Federal Court should proceed to determine the case upon its merits. Not only one, but all three, of those circumstances were present here. Certainly this action is not a declaratory judgment action that could "serve no useful" purpose, as was the case in the decisions to which petitioners refer.

This case involving an interpretation of federal laws and the effect to be given to them should have been tried out in the first instance by a federal court regardless of the two suits in a state court.

The parties in this case are not the same as those in either of the two State Court cases. Here there is an additional party, Magnolia. Here, also, this suit joined as defendants the two parties which were prosecuting separate suits in a state court. By virtue of Rule 20(a) of the Federal Rules of Civil Procedure all interested parties could be joined in this one action so that the entire controversy could be settled as to all such parties in one suit, whereas the issues in the State Court actions would be determined only as to part of the interested parties and in two saparate actions. The petitioners did not question in the Court of Appeals and do not question here the propriety of the ruling of the trial court that the parties were properly joined in this suit.

Moreover, the contracts involved in this action were made in the Northern District of Oklahoma and the notices of termination were delivered there (R. 605-606). The principal places of business, the headquarters, of the three parties involved in this action, that is, Stanolind, Skelly and Phillips, were located in that district (R. 168-169), and it was to be assumed that there the company records were and there the officers involved and other company personnel to be used as witnesses, possible witnesses or consultants, were available.

The petitioners assert (page 49) that the respondent invoked the jurisdiction of the Federal Court in Texas on removal in endeavoring to demonstrate that the trial court in this case abused its discretion. But they do not show, as indeed they cannot, that such jurisdiction was in fact invoked. They do not show that the cases were not remanded before the decision in this case on its merits, as in fact

they were. (See Appendix B wherein it will be seen that the Federal Court in Texas held the removals ineffective because not timely filed; although it was decided that a federal question was presented sufficient to sustain Federal Court jurisdiction.)

We submit that it is apparent from the petitions (R. 69, 82) filed in the two separate suits that a studied attempt was made to avoid pleading the true controversy so as not to disclose the federal question on which the case would in fact turn, thus permitting the plaintiffs to assert that the matter of whether a federal question was presented in the suits filed by them was to be determined by the face of the complaints *as they drew them*, regardless of what may have otherwise been shown to be the case. Nevertheless, the respondent did endeavor to remove the cases, feeling that with such judicial notice as the Federal Court could take, it could still be asserted that a federal question was shown by the petitions as the plaintiffs drew them. Petitions for removal were filed on the day specified for answer in the summons, but unfortunately after the hour specified (R. 81, 92). Motions to remand were filed (R. 68). Thus a serious question was presented as to whether the plaintiffs had sufficiently dodged the federal question in drafting their petitions, and also as to whether the removal was ineffective because the filing was not timely. On the other hand, in this case, without the guarded type pleading used by the two plaintiffs in the State Court the true controversy could be shown revealing the federal question and, in turn, the jurisdiction of the federal courts, thus assuring that federal laws would be interpreted and applied in the federal courts, in line with the *Brillhart* opinion. This alone

was sufficient to preclude a showing that the trial court acted arbitrarily.

As the trial court decided, and the Court of Appeals held (R. 727) the entire controversy could more appropriately and with more convenience and facility be determined in this action.

As the holdings of the Court of Appeals in this case are in accord with the applicable decisions of this Court, and there appears no conflict between the decision of the Court of Appeals here and a decision of any other Court of Appeals the respondent submits that the writ should be dismissed (*United States* v. *Rimer*, 220 U. S. 547, 55 L. Ed. 578) or, in the alternative, that the decision of the Court of Appeals should be here affirmed.

Respectfully submitted,

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November, 1949.

APPENDIX A

Excerpts From The Natural Gas Act
(15 USCA 717-717w)

Section 7 (15 USCA 717f):

* * *

"(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations;" etc. Provision is then made concerning a natural-gas company previously established.

"In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly;" etc. Provision is made for emergency certificates.

* * *

"(e) Except in the cases governed by the provisions contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and

the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

"(f) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

"(g) Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company."

Section 15(b) [15 USCA 717n(b)]:

"All hearings, investigations, and proceedings under this chapter shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this chapter."

* * *

Section 16 (15 USCA 717o):

"The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. * * * Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. * * *"

Section 19 (15 USCA 717r):

"(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

"(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the

order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *

"(c) The filing of an application for rehearing under subsection (a) of this section shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

APPENDIX B

The Significance of the Similarity Between the Clause —A Case Arising Under the Constitution or Laws of the United States—in the Constitution and in the Acts of Congress.

The Constitution empowered Congress to vest in the federal judiciary jurisdiction "of all cases, in Law and Equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority;" Article 3, Section 2.

The words were first used by Congress in connection with original federal court jurisdiction in the Act of March 3, 1875, 18 Stat. 470. By that act, Congress in turn vested original jurisdiction in United States courts of "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority * * *."

There not only was no event to indicate that Congress by adopting the substantially identical language of the clause as used in the Constitution had in mind some different meaning but, on the contrary, the events at the time Congress used the words demonstrate that it was understood the words were to have the same meaning.

The Act of 1875 was drafted substantially in its final form by Senator Matthew H. Carpenter and presumably he was responsible for the repetition of the words "arising under." 2 Cong. Rec. 4984 (1874). He was a manager of the bill for the Senate, 3 Cong. Rec. 2168 (1875), and was spokesman for the Committee when the bill was presented on the floor. Though another feature of the Act was under immediate discussion at the time, we consider the following parts of a statement of Senator Carpenter before the Senate concerning the Act of 1875 to be of general significance [2 Cong. Rec. 4986 (1874)]:

"The act of 1789 did not confer the whole power which the Constitution conferred; it did not do what the Supreme Court has said Congress ought to do; it did not perform what the Supreme Court has declared to be the duty of Congress. This bill does * * * *This bill gives precisely the power which the Constitution confers—nothing more, nothing less.* The Senator from California proposes to limit the constitutional jurisdiction and restrict it because it was restricted in 1789. * * * The whole circumstances of the case are different, and the time has now arrived it seems to me when Congress ought to do what the Supreme Court said more than forty years ago it was its duty to do, *vest the power which the Constitution confers* in some court of original jurisdiction."

Contemporary comment in legal journals was to the same effect. In the article, "Our Federal Judiciary," 2 Cent. L. Jour. 551, 553, August 27, 1875, this appeared:

"The rebellion being regarded by the wisest of our statesmen as the overgrowth of the heresy of 'states rights,' with its necessary concomitant, the doctrine of secession, it was a part of the normal growth of public sentiment, that the fear of absorption by the general government had induced the framers of our constitution to make the general government too weak.

"A very natural result of this sentiment, was to induce Congress in its attempts to strengthen the government, to confer upon the federal courts, from time to time, the reserved jurisdiction which it had not been thought fit originally to confer. Thus we see, that commencing in 1864, before the close of rebellion, and culminating in March, 1875, at the very close of the last session, Congress has exhausted its power, and has conferred upon the federal courts all the jurisdiction authorized by the constitution."

And under the title, "Reorganization of the Federal Judiciary—Mr. McCrary's Bill," 3 Cent. L. Jour. 68, 70, Feb. 4, 1876, it was written:

> "Our views are, then, 1. That the creation of intermediate courts of appeals is a necessity which ought not longer to be delayed. 2. That such courts, cannot be created without an increase of the judicial force. 3. That Congress, by expanding the jurisdiction of the federal courts to the utmost limits allowed by the constitution, has imposed upon itself the duty of providing for a sufficient number of judges to keep down the increased litigation which such extension of jurisdiction has produced * * *."

Congress used substantially the same language in subsequent judiciary legislation. Act of March 3, 1887, c. 373, Sec. 1, 24 Stat. 552; Act of August 13, 1888, c. 866, Sec. 1, 25 Stat. 433; Act of March 3, 1911, c. 231, Sec. 24, 36 Stat. 1091; Act of June 25, 1948, 28 USC, Sec. 1331.

The foregoing is not meant to say that Congress has vested in the United States District Courts all the jurisdiction which it was empowered by the Constitution to so vest. There are some limitations, such as the amount in controversy and the rule as to the manner in which the federal question must be made to appear. But it is meant to say that insofar as a determination of whether a federal question exists is concerned, the words as used in the Constitution and as used in the acts of Congress should have no different meaning or scope. Thus it is that the test used in making that determination insofar as the clause in the Constitution is concerned is the same as the test which should be used in determining the scope of those words as used in the acts of Congress. This Court has significantly applied the same test in determining the scope of the words as they appear in the legislation as was used originally in determining the scope of the words used in the Constitution. The cases are cited in the text (see page 17).

APPENDIX C

DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Stanolind Oil and Gas Company)
v.) Civil Action No. 376
Phillips Petroleum Company)

MEMORANDUM OPINION

The Court, having considered the motion of the plaintiff to remand this cause to the State Court, the arguments and briefs of the parties, and the law, finds as follows:

1. The petition and bond for removal were filed too late because they were filed after the time when defendant was required to answer under the State law; that is, after 10 a. m., June 16, 1947.

2. In my opinion plaintiff's original petition discloses a Federal question in that it involves the construction of the Natural Gas Act and of the rules, regulations and orders of the Federal Power Commission issued pursuant to the provisions of that Act.

The Clerk of the Court will accordingly advise the attorneys of record of the findings and conclusions of the Court, and request plaintiff to prepare and submit to the Court, in accordance herewith, order remanding this cause to the 126th District Court of Travis County, Texas.

/s/ Ben H. Rice, Jr.,
United States District Judge.

April 10, 1948.